Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

◆

RAYMOND A. LEDBETTER AND EDWARD T. JESZKA,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION,

Respondent.

◆

On Petition For A Writ Of Certiorari
To The United States Supreme Court

◆

PETITION FOR WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an adverse credibility finding, without direct corroborating evidence, can serve as positive evidence necessary for the government to meet its fundamental obligation to prove its case?

2. Whether evidence that requires corroboration may be corroborated by evidence that itself requires corroboration?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR ALLOWANCE OF THE WRIT 7

I. Review is Warranted to Resolve the Conflict Between Circuits as to Whether a Finding of Lack of Credibility, Without Corroborating Evidence Can Establish a Plaintiff's Burden of Proof 8

  A. The Majority Approach 9

    1. The D.C. and Second Circuits 9

    2. The First, Third, Fourth, Sixth, and Tenth Circuits 11

  B. The Seventh and Eleventh Circuit Approaches 15

II. Review is Warranted to Determine Whether Evidence That Requires Corroboration May be Corroborated by Evidence that Itself Requires Corroboration 21

CONCLUSION 25

APPENDIX

A: Initial Decision of the National Transportation Safety Board .... App. 1

B: Opinion and Order of the National Transportation Safety Board .... App. 44

C: Order of the National Transportation Safety Board Denying Petition for Rehearing .... App. 62

D: Order of the U.S. Court of Appeals for the Eleventh Circuit Denying Petition for Review of a Decision of the Department of Transportation .... App. 66

TABLE OF AUTHORITIES

CASES PAGE

Administrator v. Aviance International, Inc., EA-3095 (1993) .... passim

Anderson, 470 U.S. at 575, 105 S.Ct. 1504 13

Balzo v. Aviance International, Inc., NTSB Order No. EA-5421, 1992 WL 47610 (Feb. 12, 1993) 5

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984) .... passim

Coghlan v. NTSB, 470 F.3d 1300, 1304 (11th Cir. 2006) 7

Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952) .... passim

Eckenrode v. Pa. R.R. Co., 164 F.2d 996, 999 n. 8 (3d Cir.1947) 12

Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119 (3d Cir. 2009) 12, 13

Janigan v. Taylor, 344 F.2d 781, 784-85 (1st Cir.), *cert. denied*, 382 U.S. 879, 86 S.Ct. 163, 15 L.Ed.2d 120 (1965) 12

Martens v. C.I.R., 934 F.2d 319 (4th Cir. 1991) 13

McHenry v. Bond,
668 F.2d 1185 (11th Cir. 1982) 7

NLRB v. Walton Mfg. Co.,
369 U.S. 404, 406-08, 82 S.Ct. 853, 854-55,
7 L.Ed.2d 829 (1962) 10

Stallings v. Tansy,
28 F.3d 1018, 1023 (10th Cir. 1994) 8, 15, 16

State v. Romero,
67 N.M. 82, 83, 352 P.2d 781, 782 (1960) 15

Swaters v. Osmus,
568 F. 3d 1315 (11th Cir. 2009) ....passim

United States v. Bailey,
553 F.3d 940, 946-47 (6th Cir. 2009) 14

United States v. Brown,
53 F.3d 312 (11th Cir.1995) 17, 18, 22

United States v. Martinez,
83 F.3d 371, 374 (11th Cir.1996) 17

United States v. Mejia,
82 F.3d 1032, 1038 (11th Cir.1996) 17

U.S. v. McCarrick,
294 F.3d 1286 (11th Cir. 2002) 17, 18, 22

United States v. Percival,
756 F.2d 600, 610-11 (7th Cir.1985) 16

United States v. Rudisill,
187 F.3d 1260 (11th Cir.1999) 17, 22

U.S. v. Sliker,
751 F.2d 477 (2nd Cir. 1984) 10, 18

United States v. Toms,
136 F.3d 176, 182 (D.C.Cir.1998) 11, 14

United States v. Williams,
390 F.3d 1319, 1326 (11th Cir. 2004) 8, 17

United States v. Zafiro,
945 F.2d 881, 888 (7th Cir.1991) .... passim

U.S. v. Zeigler,
994 F.2d 845 (D.C. Cir. 1993) .... passim

Walker v. Waltham Hous. Auth.,
44 F.3d 1042, 1049 (1st Cir. 1995) 11, 16

STATUTES

49 U.S.C. § 1153(b)(3) 7

PETITION FOR WRIT OF CERTIORARI

Petitioners, Raymond Ledbetter and Edward Jeszka, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

◆

OPINIONS BELOW

The opinion of the 11th Circuit Court of Appeals (App. 1-91) is reported at 392 Fed. Appx. 779. The Board's denial of petition for rehearing may be found at (App. 1-91). The Board's opinion (App. 1-91) may be found at 2009 WL 1601680 (N.T.S.B.). The ALJ opinion may be found at (App. 1-91).

◆

JURISDICTION

The Court of Appeals entered an order denying the Petitioner's Petition for Rehearing on November 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

◆

STATEMENT OF THE CASE

Mr. Jeszka was employed as an FAA inspector in the Birmingham, Alabama Flight Standards District Office (FSDO) until he was forced to retire in June 2008 due to a hostile work environment. (Tr. at 187, 397). Jeszka had been on extended sick leave while undergoing treatment for stomach cancer. (Tr. at 190). Because Jeszka's stomach had been removed and he had lost extensive weight, the doctors surgically inserted a feeding tube. (Tr. 190, 191).

In order to return to full duty (rather than desk duty) at the FAA, Jeszka needed, among other things, to have his Certified Flight Instructor certificate (CFI) reinstated, which required him to successfully complete an oral knowledge test and a practical flight test administered by a Designated Pilot Examiner. On March 28, 2008, Mr. Jeszka completed both portions of the check ride with Mr. Raymond Ledbetter, a longtime aviator and fighter pilot who legitimately acted as his Designated Pilot Examiner. Petitioners reported the successful completion of the ride to the FAA.

The aircraft used in the practical flight test was a Cessna 172 owned by the wife of Joey Sanders. (Tr. at 64). Mr. Sanders operated Sanders Aviation at the Walker County Airport, and was a longtime friend of Ed Jeszka and Ray Ledbetter. The Petitioners had originally planned to use Mr. Sanders's aircraft on February 11, 2008 to accomplish Jeszka's, Ledbetter's and Sanders' required check rides. (Tr. at 135). Unfortunately, the doctors postponed the removal of Mr. Jeszka's feeding tube, requiring him to cancel his check ride. (Tr. at 195-196). Ledbetter and Sanders did in fact perform their annual check rides on February 11, 2008, but without Mr. Jeszka. (Tr. at 135).

The Administrator charged Petitioners with making or causing fraudulent entries to be made to the FAA pursuant to 14 C.F.R § 61.59. The FAA Administrator admitted that Jeszka had taken and passed the CFI check ride, but claimed the check ride occurred on February 11, 2008, not on March 28, 2008 as reported. (Tr. at 195-196; 65-70; 281). The Administrator could not articulate a reasonable motive for post-dating the check ride and never established materiality.

The only evidence offered by the Administrator and considered by the ALJ was Sanders' testimony that he could not recall Jeszka being at the airport or using the Cessna on March 28, 2008. Sanders originally testified that he believed Jeszka had completed his check ride on February 11, 2008, but later admitted that it would have been impossible for Mr. Jeszka to have taken the flight on February 11, 2008, given the evidence that his feeding tube had not been removed. After reviewing Jeszka's phone records, Sanders agreed that it would have been virtually unworkable for Mr. Jeszka to have flown on February 11, 2008. (Tr. at 271, 281). Although Sanders testified that he would have been aware of Petitioners' use of his aircraft, he later changed his mind and admitted that he could not remember the day at all:

> BY MR. MOULIS:
>
> Q. Let's talk about whether or not there was a flight. As you sit here, do you remember or not whether they took a flight?
>
> A. No, sir, I don't. If I did, I would have been the first guy to jump up and say, yes.

(Tr. at 415-416).

> ADMINISTRATIVE LAW JUDGE POPE: This is not getting us anywhere, Mr. Moulis.
>
> Sir, if they had used your airplane, were you there on the 28th? Do you know?
>
> THE WITNESS: I don't remember being there, sir.
>
> ADMINISTRATIVE LAW JUDGE POPE: You don't remember that day at all.
>
> MR. MOULIS: No, sir.
>
> ADMINISTRATIVE LAW JUDGE POPE: Nothing happened that day to cause it to stand out in your memory. Is that right?
>
> MR. [SANDERS]: No, sir, that I can remember. The main thing I remember is February 11 because of the instructor's certificates.
>
> ADMINISTRATIVE LAW JUDGE POPE: All right. Is it possible that they could have used your airplane on a particular day and you not know about it?
>
> THE WITNESS: Yes, sir. Anything's possible.
>
> ADMINISTRATIVE LAW JUDGE POPE: No, sir. I don't want to hear that again.

> THE WITNESS: But, yes, sir. It's possible.

(Tr. at p. 417).

> ADMINISTRATIVE LAW JUDGE POPE: Do you have any recollection that your aircraft took off with your permission or without your permission with the Respondents in the aircraft, or with some other person in the aircraft unknowing to you?
>
> THE WITNESS: No, sir. I just don't remember. That's what I've said all along.

(Tr. at p. 418-419).

> BY MR. MOULIS:
>
> Q. And after reviewing the phone records, did that refresh your recollection as to whether or not maybe Mr. Jeszka and Mr. Ledbetter were at your facility or in Jasper?
>
> A. The way I remember answering that -- and I stay the same -- it's a possibility. It's possible for anything.

(Tr. at 414).

The FAA's case relied ultimately and conclusively on Mr. Sanders's lack of memory of March 28, 2008. NTSB precedent, however, holds that a witnesses' lack of recollection of an event cannot be considered probative unless it is supported by corroborating evidence. Balzo v. Aviance

International, Inc., NTSB Order No. EA-5421, 1992 WL 47610 (Feb. 12, 1993)

No direct corroborating evidence was submitted.

Nonetheless, the ALJ issued an Oral Initial Decision wherein he affirmed the FAA's Order of Revocation. The ALJ based his decision on negative inferences arising from his adverse credibility findings against Petitioners. Sanders' and the Petitioners' testimony, however, did not conflict because Sanders merely testified that he could not remember whether the flight check occurred on March 28, 2008. Nevertheless, the ALJ erroneously ruled that if the flight had occurred, Sanders would have remembered it, and therefore, either Sanders was lying or the Petitioners were lying. (Tr. at 488-489). Considering the ALJ found that Sander's testimony was credible, it must have believed that Sanders truthfully could not remember March 28, 2008 at all. This evidence is not probative.

Therefore, the only evidence that was considered was the ALJ's determination that the Petitioners had motive to lie because they had been accused. Based upon this flawed inference, the ALJ concluded that the opposite of the Petitioners' testimony must be true. Indeed, the ALJ, the NTSB, and the 11th Circuit agreed that Sanders' failure to remember March 28, 2008 was not dispositive, as the ALJ's conclusion was "largely based on" the ALJ's determination that Petitioners' testimony was not credible. (Panel Decision at p. 14) (citing Swaters v. Osmis, 568 F. 3d 1315, 1324 (11th Cir. 2009).

The Petitioners timely appealed to Eleventh Circuit Court of Appeals. On August 16, 2010, the Court affirmed the NTSB Board's decision and denied Ledbetter's and Jeszka's Petition for Review. In its opinion, the Court noted that "Findings of fact by the NTSB, if supported by substantial evidence, are conclusive." Coghlan v. NTSB, 470 F.3d 1300, 1304 (11th Cir. 2006) (quoting 49 U.S.C. § 1153(b)(3)). Additionally, the Court recognized that "substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir. 1982). Despite these acknowledgements, the Eleventh Circuit held that the FAA had met its burden due to the ALJ's adverse credibility findings. Acknowledging that Sanders failure to recall required corroborative evidence, the 11th Circuit reasoned that "the ALJ's credibility determination constitutes positive evidence against petitioners and in support of the FAA's case." (Panel Decision at p. 12, internal quotation omitted). The Eleventh Circuit then denied the Petitioners' Petition for Rehearing on November 9, 2010.

REASONS FOR ALLOWANCE OF THE WRIT

Whether a finding of lack of credibility, without other probative evidence, is sufficient to support an Agency's conclusion that the government has met its burden of proof is a question of national importance. The issue arises frequently in criminal, civil, and regulatory cases alike. The results and rationale in cases where this issue is addressed are varied and occasionally startling: in the most extreme cases, the defendant's due process rights are infringed where a court finds that the defendant's testimony alone is so far negated that the government's burden is met for it.

I. Review is Warranted to Resolve the Conflict Between Circuits as to Whether a Finding of Lack of Credibility, Without Corroborating Evidence Can Establish a Plaintiff's Burden of Proof

The difficulties with the issue have resulted in an entire spectrum of standards, with each circuit quoting similar language, but then choosing its own solution. This Court addressed the issue in Bose Corp. v. Consumers Union of United States, Inc., holding that "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." 466 U.S. 485, 512 (1984). Since that time however, the circuit courts have questioned, challenged, and confused this precedent, leading to a circuit split. Several members of these courts have openly acknowledged this confusion. See, e.g., United States v. Williams, 390 F.3d 1319, 1326 (11th Cir. 2004) ("In my view, it remains unclear in the Eleventh Circuit when negative inferences from a defendant's denial of guilt can be used by an appellate court to remedy an otherwise deficient government case"); and Stallings v. Tansy, 28 F.3d 1018, 1023 (10th Cir. 1994) ("Although this circuit has not addressed this issue directly, several circuits have held that the jury's disbelief of a defendant's testimony can, in some limited instances, give rise to a positive inference of guilt. These circuits do not agree, however, on the circumstances that will support such an inference.") As evidenced by this case, without further guidance from this Court, the circuit courts continue to be indecisive on this issue.

A. The Majority Approach

While the majority of the circuit courts recite the Bose standard, the degree to which each complies with said standard differs.

1. The D.C. and Second Circuits

More than any other circuits, the D.C. and Second Circuits are the least reluctant to "fill the gaps" regarding evidentiary proof with an adverse credibility finding when a plaintiff's case is deficient in establishing the necessary elements. These circuits appear to adhere to the principle first discussed by Judge Learned Hand in the Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952):

> Dyer v. MacDougall began as an action for libel and slander. The plaintiff's only witnesses would have been the two defendants. His plan was to call them to the stand, have them deny uttering the slanders, and hope the jury, in light of their demeanor, would believe the opposite of what they testified. Because in such event there could be no effective appellate review of a verdict in the plaintiff's favor, Judge Hand ruled for the court that the defendants were entitled to summary judgment. To be sure, a witness's demeanor "is a part of the evidence." 201 F.2d at 269. The jury "may, and indeed they should," take it into consideration. Id. Demeanor evidence "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his

> story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." Id.; cf. NLRB v. Walton Mfg. Co., 369 U.S. 404, 406-08, 82 S.Ct. 853, 854-55, 7 L.Ed.2d 829 (1962). "He, who has seen and heard the 'demeanor' evidence, may have been right or wrong in thinking that it gave rational support to a verdict; yet, since that evidence has disappeared, it will be impossible for an appellate court to say which he was." Id. Thus, while it was "true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him." Id.

Dyer v. MacDougall, 201 F.2d 265 (2nd Cir. 1952).

Since this decision, the D.C. and Second Circuits have consistently held that although a factfinder may and should consider witness testimony, an adverse credibility finding is not enough to make up for a lack of affirmative evidence on the part of the Government. See United States v. Sliker, 751 F.2d 477, 495 n. 11 (2d Cir.1984) ("Although [demeanor] is a legitimate factor for the jury to consider, this could not remedy a deficiency in the Government's proof if one existed"); United States v. Zeigler, 994 F.2d 845, 848-49 (D.C. Cir. 1993) ("We do not begin and end on nothing more than a guess about what the jury might have observed at trial. Appellate review of the sufficiency of evidence protects against wrongful convictions. We refuse to destroy the protection in cases in which defendants testify"); and United States v. Toms, 136 F.3d 176, 182 (D.C.Cir.1998) (An appellate court must not "allow the jury's discrediting of the defendant's testimony to make up for a shortfall in the sufficiency of the government's evidence").

2. The First, Third, Fourth, Sixth, and Tenth Circuits

These courts appear to support the notion that when there is affirmative evidence to establish the necessary elements, an adverse credibility finding may bolster a plaintiff's case. See, e.g., Walker v. Waltham Hous. Auth., 44 F.3d 1042, 1049 (1st Cir. 1995), holding that without "other evidence" an adverse credibility finding alone is not enough.

In Waltham Hous. Auth, the issue was whether the plaintiff met its burden to prove malice in postponing a meeting. 44 F.3d 1042, 1049 (1st Cir. 1995). The only evidence was the defendant's testimony that the postponement was not malicious. Id. The Court held that because there was no "other evidence" of malice and malice was not the only logical alternative to believing in full defendant's account of his own motives in postponing the meeting, the finding must be reversed:

> Most of the authorities say that one side cannot carry its affirmative burden of proof on a fact by pointing to the possibility that the jury disbelieved the other side's denial of the

fact. United States v. Zeigler, 994 F.2d 845, 848-50 (D.C.Cir.1993); Janigan v. Taylor, 344 F.2d 781, 784-85 (1st Cir.), cert. denied, 382 U.S. 879, 86 S.Ct. 163, 15 L.Ed.2d 120 (1965); Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir.1952) (Hand, J.). But others have disagreed, see United States v. Zafiro, 945 F.2d 881, 888 (7th Cir.1991), aff'd on other grounds, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993), and the strength of such an inference could vary greatly depending on context, including other evidence and the logical force of the inference.

The Third Circuit subscribes to a similar approach. In Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119 (3d Cir. 2009), the issue was whether Appellants counsel had wrongfully withheld documents during discovery. Appellants argued that the court based its decision solely on its disbelief of the Appellants' testimony.

> Appellants also challenge the weight that Judge Gardner gave these credibility determinations, arguing that credibility determinations supplanted affirmative evidence of wrongdoing. Appellants are correct that "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (citation omitted); see also Eckenrode v. Pa. R.R. Co., 164 F.2d 996, 999 n. 8 (3d Cir.1947) ("[A] belief that testimony is false will not support an affirmative finding that the reverse of that

testimony is true."). Similarly, as Highmark observes, "a court may not 'insulate [its] findings from review by denominating them credibility determinations.' " Highmark Br. at 39 (alteration added) (quoting Anderson, 470 U.S. at 575, 105 S.Ct. 1504).

The Third Circuit agreed with the Appellants that an adverse credibility finding is insufficient to serve as affirmative evidence of proof, but explained that the adverse credibility finding was not dispositive. Grider v. Keystone Health Plan Cent., Inc., 580 F.3d 119 (3d Cir. 2009). Rather, the lower court based its finding upon the judge's logical inference resulting from his own independent observations of the lack of documents produced early on, the delay and the sudden rash of production once a special master was appointed. Id. In fact, the Third Circuit commented that absent the adverse credibility finding, the burden would still have been met. Id.

The Fourth Circuit held that where a witness is not credible, the court should disregard that testimony, rather than holding the opposite as true. For instance, in Martens v. C.I.R., 934 F.2d 319 (4th Cir. 1991), despite the tax payer's contrary testimony, the Tax Court found that the evidence did not support a finding that the tax payer spent more than an insubstantial amount of time in the equipment leasing activity. The tax payer had the burden of proof. Citing Bose, the court explained that it was free to disregard the testimony if it found that the witness was not credible. Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 512 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it.").

The Sixth Circuit, in United States v. Bailey, 553 F.3d 940, 946-47 (6th Cir. 2009), held that the government's burden would not be satisfied by an adverse credibility finding alone to establish necessary elements. In Bailey, the court explained that regardless of whether the jury believed the oral testimony that the defendant did not have control over the firearm found underneath his seat, the prosecution had the burden of producing sufficient evidence to convict:

> The district court is correct that assessment of the credibility of the witness lies within the province of the jury. In reviewing the sufficiency of the evidence, however, the court of appeals must not "allow the jury's discrediting of the defendant's testimony to make up for a shortfall in the sufficiency of the government's evidence." United States v. Toms, 136 F.3d 176, 182 (D.C.Cir.1998). The reason for this rule, first articulated by Judge Learned Hand in 1952, is that "[t]here is no principled way of deciding when the government's proof, less than enough to sustain the conviction, is nevertheless enough to allow adding negative inferences from the defendant's testimony to fill the gaps." United States v. Zeigler, 994 F.2d 845, 850 (D.C.Cir.1993) (applying Dyer v. MacDougall, 201 F.2d 265 (2d Cir.1952)). Although the sufficiency-of-the-evidence standard is highly deferential to the jury, we cannot let this deference blind us on review to the

government's burden to prove guilt beyond a reasonable doubt.

The Tenth Circuit, in Stallings v. Tansy, 28 F.3d 1018, 1024 (10th Cir. 1994), after first considering the myriad of approaches available according to circuit standards, chose not to decide which, if any, of these approaches it should adopt, as "an inference of guilt is not permissible under any theory here." Id.

> The jury's disbelief of petitioner's testimony could not fill the gap left by the State's total lack of relevant evidence as to petitioner's guilty knowledge. When "the evidence must be buttressed by surmise and conjecture, rather than logical inference in order to support a conviction, ... such conviction [cannot be allowed] to stand." State v. Romero, 67 N.M. 82, 83, 352 P.2d 781, 782 (1960).

Stallings v. Tansy, 28 F.3d 1018, 1024 (10th Cir. 1994).

B. The Seventh and Eleventh Circuit Approaches

With its opinion in United States v. Zafiro, 945 F.2d 881, 888 (7th. Cir. 1991), the Seventh Circuit set itself apart from virtually every other court, by holding that although "there was no direct evidence against [the defendant]," her conviction could nevertheless be affirmed by her apparent demeanor and the conjecture of an expert witness regarding the habits of drug dealers. Although the court acknowledged that other circuits had expressed concern over placing too much weight on negative inferences, the Seventh Circuit misapprehended this Court's opinion in Bose, reasoning that a failure to grant a directed verdict was moot and the Government's burden to prove its case in chief was not required.

> Such cases are unlikely to occur, however, for if there is no evidence of guilt other than what the defendant might supply by offering protestations of innocence that the jury disbelieved, he would have no reason to take the stand; he would be entitled to a directed acquittal at the close of the government's case. .. We therefore need not decide whether, if Zafiro had not taken the stand, the testimony of the expert witness would have been enough to tip the scales of justice to guilt, given the heavy burden of proof that the government bears in criminal cases. That issue is moot. She testified; and on the basis of her demeanor and the expert testimony ...[n]o more was necessary to make her an aider and abettor of that conspiracy. Cf. United States v. Percival, 756 F.2d 600, 610-11 (7th Cir.1985).

United States v. Zafiro, 945 F.2d 881, 888 (7th Cir. 1991) aff'd on other grounds, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

This Seventh Circuit has been criticized for this decision and clarity from this Court is required United States v. Zeigler, 994 F.2d 845 (D.C. Cir. 1993); Walker v. Waltham Hous. Auth., 44 F.3d 1042, 1049 (1st Cir. 1995); and Stallings v. Tansy, 28 F.3d 1018 (10th Cir. 1994); see also Jon O. Newman, Beyond "Reasonable Doubt", 68 N.Y.U. L. Rev. 979, 995 (1993).

Perhaps the least clear of all the circuit court approaches however, is that of the Eleventh Circuit. The confusion in this circuit was best described in United States v. Williams, 390 F.3d 1319, 1326 (11th Cir. 2004) by District Judge Corrigan (sitting by designation) in his concurring opinion:

> I concur in the Court's holding that, giving the government's evidence every benefit of the doubt, there was sufficient evidence to support the jury's verdict. I also agree that the jury was free to disbelieve the defendant's denial of criminal intent. See United States v. Brown, 53 F.3d 312 (11th Cir.1995). However, I regard the Court's discussion of Brown concerning the use of the defendant's denial of guilt as substantive evidence of guilt as dicta and potentially problematic. In United States v. McCarrick, 294 F.3d 1286 (11th Cir.2002), decided seven years after Brown, the Court, in holding that there was insufficient evidence to support the jury's verdict notwithstanding that the defendant testified and denied guilt, explained: "Our cases since Brown have reiterated the government's fundamental obligation to establish its case-in-chief." See id. at 1293 (citing United States v. Rudisill, 187 F.3d 1260, 1268 (11th Cir.1999); United States v. Martinez, 83 F.3d 371, 374 (11th Cir.1996); United States v. Mejia, 82 F.3d 1032, 1038 (11th Cir.1996)).

> **In my view, it remains unclear in the Eleventh Circuit when negative inferences from a defendant's denial of guilt can be used by an appellate court to remedy an otherwise deficient government case.** Both Brown and McCarrick indicate that such negative inferences can become positive evidence of guilt, but only where there is "some corroborative evidence of guilt." How much corroborative evidence is necessary, short of evidence establishing guilt beyond a reasonable doubt? Neither Brown nor McCarrick answer that question. Other courts have recognized this problem and have held that an appellate court may not affirm "on the supposition that the defendant's demeanor filled the gap in the government's proof" lest appellate review concerning the sufficiency of the evidence become meaningless in cases where the defendant testifies and denies guilt. See United States v. Zeigler, 994 F.2d 845, 845-46 (D.C.Cir.1993); see also, United States v. Sliker, 751 F.2d 477 (2d Cir.1984); but see United States v. Zafiro, 945 F.2d 881, 888 (7th Cir.1991)(holding that a defendant's denial of guilt can become evidence of guilt to add to the other evidence). McCarrick, with its emphasis on the government's fundamental obligation to prove its case, seems to accord more with this view. However, because it is unnecessary to the result in this case to face this question, I would not do so.

Id.

The Eleventh Circuit had the occasion to decide this very issue in the case at bar, but, instead of clarifying their standard, only succeeded in further confusing the issue. For one, the court acknowledged Aviance, which held that this type of alleged falsity must be supported by corroborating evidence:

> This proceeding is somewhat atypical in that in most cases involving falsification charges, there is no doubt that a false statement has been made in some record. Rather, the issue is usually whether the individual who made the statement did so intentionally, an element that almost invariably must be established circumstantially, since direct evidence of intent is rarely available. Here, by contrast, the issue is not whether there was an intentional falsification; the issue is whether there was a falsification at all. We think the Administrator's proof must be more compelling in the latter situation, for it is far more difficult to defend against a case that is based on conjectural liability. It is in the light of these considerations that we note that the Administrator did not produce any direct evidence that respondent Moore, the carrier's check airman, had created bogus flight check forms for his carrier's pilots.

Aviance, NTSB Order No. EA-3085, at *2 (1993).

The Eleventh Circuit claimed that Aviance was distinguishable, however, because the fact finder's credibility finding could serve as the direct evidence required to corroborate an inference raised from a witnesses' lack of recollection. Pursuant to this Court's precedent, however, an adverse credibility finding cannot serve as direct evidence. Testimony that is not credible does not serve as evidence of the opposite. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 (1984). Pursuant to the Eleventh Circuit, inherently unreliable evidence that is not probative absent corroboration can become reliable evidence if supported by the opposite of the defendant's testimony.

> The ALJ's credibility determination "constitutes positive evidence against [petitioners] and in support of the FAA's case."

(Panel Decision at p. 12; quoting Swaters, 568 F.3d at 1324.).

Even the Eleventh Circuit's reliance on Swaters is misplaced. In Swaters, the ALJ specifically noted that the FAA had made a prima facie showing establishing its case. "Indeed, the Board found "more than enough evidence to establish the Administrator's prima facie case." Id. at *5 Swaters v. Osmus, 568 F.3d 1315, 1321 (11th Cir. 2009)). This is the complete opposite of this case, where the FAA made no prima facie showing, and the ALJ's analysis relied on the ambiguous statements of a neutral witness. Instead, the Eleventh Circuit now seems to be saying that a defendant's adverse credibility finding, without direct evidence from the plaintiff, may alone establish the plaintiff's case for him. With its per curiam decision, the Eleventh Circuit has placed itself squarely at odds with the Supreme Court and nearly every other circuit court of appeals.

II. Review is Warranted to Determine Whether Evidence That Requires Corroboration May be Corroborated by Evidence that Itself Requires Corroboration

As discussed above, the Eleventh Circuit's interpretation is squarely opposed to the standard set by this Court in Bose, as well as prior Eleventh Circuit Precedent and the decisions of the majority of circuit courts. Effectively, the Eleventh Circuit now seems to say that an adverse credibility finding, without any direct evidence, may establish a plaintiff's case.

The court held that the ALJ's adverse credibility finding regarding the Petitioners served as the corroborating evidence necessary to support Sanders' testimony. Sanders' testimony, however, can be described, at best, as neutral, as he testified that he did not remember March 28, 2008 and could offer no material evidence whether the flight occurred that date or not. The Eleventh Circuit even noted in its decision that Sanders "waffled" in his testimony, and that it, alone, was not enough to establish the necessary elements of the FAA's case.

> Sanders' testimony was not by itself dispositive because the ALJ's conclusion that Ledbetter and Jeszka did not conduct the test flight in Sanders' Cessna on March 28 as they claimed was "largely based on" the ALJ's determination that Petitioners' testimony to that effect was not credible.

(Panel Decision at p. 14) (citing Swaters v. Osmus, 568 F. 3d 1315, 1324 (11th Cir. 2009).

According to 11th Circuit precedent, however, a finding of lack of credibility may not serve as positive evidence unless it, itself, is supported by corroborating evidence:

> In Brown, we held that, in combination with other evidence, the jury's disbelief of a defendant's testimony may be used to help establish his guilt. We explained that 'a statement by a defendant, if disbelieved by the jury may be considered as substantive evidence of the defendant's guilt .... [a]t least where some corroborative evidence exists for the charged offense....' Brown, 53 F.3d at 314 (emphasis in original). Our cases since Brown have reiterated the government's fundamental obligation to establish guilt in its case-in-chief. See United States v. Rudisill, 187 F.3d 1260, 1268 (11th Cir.1999).

U.S. v. McCarrick, 294 F.3d 1286, 1293 (11th Cir. 2002).

The Panel Decision overturned this 11th Circuit precedent by failing to require the Administrator to meet its fundamental obligation to establish guilt in its case-in-chief through some direct evidence. In fact, the NTSB Board acknowledged that the evidence the Administrator submitted in its case in chief was not dispositive and did not establish Petitioners' guilt, but wrongfully held that Petitioners' alleged guilt could be based upon the ALJ's credibility finding.

Just as in Aviance, the Administrator did not produce any direct evidence that Petitioners falsely claimed the check ride was performed on March 28, 2008. Instead, as in Aviance, the Administrator relied upon the witness's testimony that he could not remember whether Petitioners were at the airport on March 28, 2008. According to NTSB precedent, which the 11th Circuit holds must be followed, a negative inference may not be drawn from Sanders' lack of recollection unless it is supported by corroborating evidence. Similarly, a lack of credibility may not be dispositive unless supported by direct evidence. Double non-probative evidence does not equal probative evidence. No direct evidence was offered.

Moreover, the adverse credibility finding that was dispositive as to guilt was based upon the ALJ's belief that Petitioners had a motive to lie because they had been accused and faced potential revocation of their certificates. (Panel Decision at p. 8) (Acknowledging that the ALJ relied upon the fact that "both men had a motive to lie in order to avoid the revocation of their airmen certificates"). Under that theory, every single accused defendant has a motive to lie, and is therefore not credible and in return is guilty. All that is required is an accusation.

In addition to the misapprehension of the law as stated above, the Court misapprehended the only evidence submitted by the Administrator. The main misapprehension lies in the Court's failure to recognize the fundamental difference between having knowledge or being aware at the time of the event and recollecting or remembering the event some fourteen months later. Where Sanders testified that he does not remember March 28, 2008 at all, including whether the Petitioners used his aircraft, the Court held that Sanders did not ever have knowledge of the Petitioners using Sanders' aircraft. (Panel Decision at p. 11) ("Sanders testified that he ... did not have any knowledge of the two men conducting a practical test flight in his Cessna on March 28, 2008, as they claimed.") compare with ("ADMINISTRATIVE LAW JUDGE POPE: Do you have any recollection that your aircraft took off with your permission or without your permission with the Respondents in the aircraft, or with some other person in the aircraft unknowing to you? THE WITNESS: No, sir. I just don't remember. That's what I've said all along.")

(Tr. at p. 418-419). In reality Mr. Sanders repeatedly testified that he did not remember March 28, 2008 at all, therefore he had no material testimony that could contradict the Petitioners' testimony and no other material evidence was submitted by the Administrator.

Similarly, the Eleventh Circuit's rationale that because Petitioners testified that Sanders was present at the airport on March 28, 2008 and that the flight had been pre-arranged, Sanders would have known about the flight if it occurred also misapprehends the difference between knowledge at the time and recollection later. (See Panel Decision at p. 11). Just because Sanders was there, but did not recall the day or any of the events occurring on that day does not mean that Sanders did not know about the event at the time it occurred.

The circuit split and the refusal to follow this Court's precedent is now so pronounced as to merit intervention from this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted to review the judgment.

Respectfully submitted,

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UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:
LYNNE A. OSMUS, ACTING ADMINISTRATOR,
Federal Aviation Administration,

Docket Nos.: SE-18571 and SE-18572

Complainant,
v.
RAYMOND LEDBETTER, and
EDWARD THADDEUS JESZKA,

Respondents.

U.S. Tax Court Courtroom 1136
Russell Federal Building and Courthouse
75 Spring Street, SW
Atlanta, Georgia

Thursday, May 14, 2009

The above-entitled matter came on for hearing, pursuant to recess, at 9:45 a.m.

BEFORE: WILLIAM A. POPE
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:
GAYLE FULLER, ESQ.
CHRIS STEVENSON, ESQ.
Federal Aviation Administration
1701 Columbia Drive
College Park, Georgia 30337

On behalf of the Respondents:
MICHAEL A. MOULIS, ESQ.
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954-547-0555

ORAL INITIAL DECISION

ADMINISTRATIVE LAW JUDGE POPE: The following is my oral initial decision in Acting Administrator, Federal Aviation Administration, Complainant, versus Raymond Ledbetter, Edward Jeszka, docket numbers SE-18571 and SE-18572, Respondents.

These are proceedings under the provisions of 49 U.S.C. Section 44709, formerly Section 609 of the Federal Aviation Act, and the revisions of the Rules of Practice in Air Safety Proceedings of the National Transportation Safety Board.

Raymond Ledbetter and Edward Jeszka, the Respondents, have appealed the Administrator's emergency orders of revocation dated April 14, 2009, and April 17, 2009, respectively, which pursuant to Section 821.31(a) of the Board's rules serve as the complaints.

In the complaint against Respondent Ledbetter, the Acting Administrator ordered the revocation of his airline transport pilot certificate, flight instructor certificate, mechanic certificate, and any other airman certificates he may hold, because he allegedly violated FAR Section 61.59(a) (2) and Section 61.59(b) by making or causing to be made a fraudulent or intentionally false entry on a temporary airman flight instructor certificate issued to Edward Thaddeus Jeszka.

In the complaint against Respondent Jeszka, the Acting Administrator ordered the revocation of his airline transport pilot certificate, flight instructor certificate, mechanic certificate, and any other airman certificates he may hold, because he allegedly violated FAR Section 61. 59 (a) (2) and 61. 59 (b), by making or causing to be made a fraudulent or intentionally false entry on a temporary airman flight instructor certificate issued to him by Respondent Raymond Arthur Ledbetter. In his answer to the complaint against him, Respondent Ledbetter admitted paragraphs 1 through 4 and 7 of the complaint, and denied the remainder of the complaint. Thus, Respondent Ledbetter admitted that he holds airline transport pilot certificate, flight instructor certificate, and mechanic certificate, all alleged in the complaint; that on March 18, 2008, he as a designated pilot examiner issued a temporary airman flight instructor certificate to Edward Thaddeus Jeszka; that the designated pilot and flight engineer examiner's handbook states that the date of issuance for block X of FAA Form 8060-4 is the date of the completion of the practical test; that he electronically signed the temporary certificate, indicating the date of issuance as March 28, 2008;

and the temporary airman certificate is a record required to be kept, made or used to show compliance with a requirement for the exercise of the privileges of a certificate under Part 61 of the FARs.

In his answer to the complaint against him, Respondent Jeszka admitted paragraphs 1 through 4 and 7 of the complaint, and denied the remainder of the complaint.

Thus, Respondent Jeszka admitted that he holds the airline transport pilot and flight instructor certificates alleged in the complaint; that on or about March 28, 2008, he initiated an electronic application for the issuance of his flight instructor certificate; that as a result of this application, Raymond Arthur Ledbetter, as a designated pilot examiner, created a temporary airman certificate, FAA Form 8060-4, for him; that the designated pilot and flight examiner's handbook states that the date of issuance in block X of FAA Form 8060-4 is the date of completion of the practical test; that the temporary certificate indicated that the date of issuance was March 28, 2008; and the temporary airman certificate is a record required to be kept, made or used to show compliance with a requirement for the exercise of the privileges of a certificate under Part 61 of the FARs. Both Respondents denied allegations in paragraph 5 and 6 of their respective complaints, that the date of issuance of March 28, 2008, is fraudulent or intentionally false in that Respondent Jeszka did not complete a practical test with Respondent Ledbetter on March 28, 2008, or that either of them made or caused to be made fraudulent or intentionally false statements concerning the date of issuance on the temporary airman certificate.

They both denied paragraphs 8 and 9 of their respective complaints, that they lacked the qualifications to be the holder of any airman certificate or violated the sections of the "federal Aviation Regulations as alleged in their respective complaints. Therefore, simply put, the first issue to be decided is whether the date of issuance of March 28, 2008, as stated on the temporary airman certificate applied for by Respondent Jeszka and issued by Respondent Ledbetter is false, in that Respondent Jeszka did not complete a practical test with Respondent Ledbetter on March 28, 17, 2008. If that date is false, the question then becomes whether it was fraudulent or intentionally false, and made or caused to be made by either or both of the Respondents and was material. That leads then to the issue of whether either or both of the Respondents lack the qualifications to hold any airman certificate.

Thomas Frisch, the assistant manager of the Atlanta Flight Standards District Office, was called to testify by the Administrator. The Respondent, through counsel, stipulated that they knew that the date to be entered on block X of the FAA Form 8060-4 was the date of completion of the practical test as alleged in paragraph 3 of the complaints, which they admitted in their answers. It was further stipulated that if an application is completed electronically, it is the same as if completed on paper and signed. Joseph Gordon Sanders testified that he has 33 years' experience in aviation, with 22 years as a pilot for Federal Express and 23 years in the Air National Guard. He has owned Sanders Aviation since 1998. His business sells self-service fuel. He also operates a flight training center. At the time relevant to this case, he was a DPE, or designated pilot examiner, and held a certified flight instructor certificate.

His wife is the owner of N272TL, which she inherited from her father. It is kept most of the time in a locked hangar at his facility at the Walker County Airport in Jasper, Alabama. It is not rented out. On February 11, 2008, Respondent Ledbetter called and said that he and Respondent Jeszka wanted to renew their flight instructor certificates. They arrived at the hangar where Sanders kept N272TL at about 10:00 a.m. Sanders said that they were both friends and that he had known Respondent Ledbetter for 30 years and Respondent Jeszka for ten to twelve years. He said he was glad to see Respondent Jeszka who had recovered from cancer. Both he and Respondent Ledbetter worked on separate laptop computers at Sanders' facility. Sanders logged onto an FAA website known by the acronym IACRA, and entered the data for renewal of his certified flight instructor certificate. He thought that Ledbetter was similarly working on electronic renewal of his certified flight instructor certificate. He did not see if Ledbetter was working on renewal or reinstatement of Respondent Jeszka's certified flight instructor certificate. He said there were two flights in N272TL that day. The first flight was by Respondent Ledbetter and Respondent Jeszka. They took off at about noon and returned about an hour and a half later. The second flight was that of Sanders and Respondent Ledbetter, during which they administered practical tests for the flight instructor certificate to each other. Sanders said that his hangar at the Jasper, Alabama airport faces the runway, and he saw Respondent Ledbetter and Respondent Jeszka take off together that day.

Administrator's Exhibit A-2 is Respondent Ledbetter's official FAA records which confirm that his CFI certificate was renewed by Sanders on that day in a flight in Sanders' aircraft, N272TL. Sanders said that later that day, Respondent Ledbetter gave him $100 to cover the cost of fuel. He said Ed Banks, Jeff Dockery, and Sarah Rutland were at his facility that day. Sanders said that normally he would not remember specific dates, but he remembers the date of 2/11/2008 because his CFI certificate was renewed by Respondent Ledbetter that date. He said that that is the only record he has of the events on 2/11/08, because his aircraft is not a rental aircraft and he is not required to keep records of its usage.

Sanders says he does not have any knowledge that the Respondents used his aircraft for a flight on a later date in 2008. He said if his aircraft had been used on March 28, 2008, he would know about it, but he had no knowledge of such a flight. He said his aircraft is stored in a locked hangar at the Jasper, Alabama, airport, but conceded at times it could be outside with the keys in it. Sanders said that Respondent Ledbetter came to his office on February 15, 2009, a year later, and said he had received a letter of investigation, hereafter called the LOI, about the incident from the FAA. Sanders told him that he remembered that they had renewed each other's flight instructor certificates and that Respondent Ledbetter had renewed Respondent Jeszka's flight instructor certificate. He said there was confusion, and at first Respondent Ledbetter said that he thought that Respondent Jeszka was there that day but did not fly because he was sick. The next day Respondent Ledbetter called Sanders and said that Respondent Jeszka was not there, because he sick and had been in a lawyer's office all day concerning his son who had been arrested. Sanders said that, to apply for a certified flight instructor certificate, airmen log on to the FAA website called IACRA, and the applicant fills out an application and receives a tracking number. Then the designated examiner pulls up the application and reviews it. The applicant signs the application electronically. After the oral examination and check ride, the examiner puts in the dates, time, the N number of the aircraft used, and a temporary certificate can be printed out. He said that if that procedure was followed, the FAA would have a record of it.

The parties stipulated that the Administrator's sanction guidance table provides for a revocation as the sanction for making intentional false or fraudulent statements. Jeffrey Dockery, a flight instructor for the past two years, stated that in 2008, he worked in space in the Sanders Aviation building at the Walker County Airport in Jasper, Alabama, rented by his employer at that time, Airline Transport Professionals. He said he was generally at his place of employment seven days a week, and that he had met the Respondents through Sanders. He said he interpolated from his logbook that on February11, 2008, that the Respondents were at Sanders' facility, working with Sanders. He said that Sanders said they were going to do a check ride that day. He said he flew with a student to Meridian, Mississippi, that day to have a free lunch, and did not see Sanders' aircraft being flown. In the evening, he helped push the aircraft into the hangar and its engine was warm. He said he did not remember seeing the Respondents there on any other day. He said that in a telephone conversation with the Respondents' attorney yesterday, being the day before he testified, the attorney said he had evidence that the Respondents were at Sanders' facility in March 2008 and not there in February 2008. He said he did not mention his logbooks to the attorney. He said that he had been told by the FAA and Sanders to look in his logbook for that day, and that he remembered that it was the day he had flown to Meridian. He said that he asked FAA counsel what to expect at the hearing and was told to tell the truth. He said he did not remember when he left that day for Meridian, but that he was back before dark. He said he flew about three-and-a-half hours and took approximately an hour for lunch. He does not recall specific times of day. He did not see any flights by Sanders' aircraft. He acknowledged that he gave a statement to the FAA sometime in March 2009. He said he did not say the day was February 11, just that it was sometime in the month of February. He said he had already checked and knew it was February 11, but he did not want to say so because he did not want to have to come to the hearing. He said the day he flew to Meridian was the same day he saw the Respondents, and his logbook shows that the flight to Meridian was on 2/11/08.

Linda Silvertooth, the office manager of the FAA's Alabama Flight Standards District Office, was called as a witness by the Administrator. She said that Respondent Jeszka retired from his position as an FAA aviation safety inspector at the Alabama FSDO in June 2008, after being on sick leave for an extended period. His time and attendance records, Exhibit A-5, show that he was on sick leave during the pay periods 4, from 2/3 to 2/16/2008, and during pay period 7, from 3/16 to 3/29/2008. He worked four ten-hour days a week, and his day off was Friday. Had he not been on sick leave, 2/11/08 would have been a scheduled workday for him. 3/28/08 would have been a scheduled day off. She said it would have been improper for him to take a check ride in connection with his work while on donated sick leave, and as an FAA aviation safety inspector, he could not take a check ride with anyone except another inspector. He could not take a check ride with someone over whom he had oversight, which included Respondent Ledbetter. Further testimony on this point was disallowed in the Administrator's case in chief, but the Administrator was given leave to pursue this line of testimony in rebuttal. The Administrator rested, and the Respondents' motion to dismiss was denied. Respondent Ledbetter testified in his own behalf. He started flying in the Civil Air Patrol 50 years ago and has worked in aviation for the past 40 years. He has been a CFI for that long.

He was a pilot examiner from 1977 to 1998. He served four years in the Air Force and 30 years in the Air National Guard. He holds an ATP with 10 ratings, an A&P, a CFI certificate, and has 25,000 hours of flight time. He has no prior violations. He said he has known Respondent Jeszka for 30 years, first as a mechanic. Then he went through pilot training, joined the Air National Guard, and flew F-4 fighters. He said he flew with Respondent Jeszka on 3/28/08. He said that he thought that he probably met Respondent Jeszka in Sumiton, Alabama, and they rode together to Jasper, Alabama.

From Verizon telephone records, he said that they apparently rode together to Jasper between 2:24 p.m. and 4:21 p.m., and he thinks that they did the oral examination during that period and flew after 4:21 p.m. He said they finished the computer after they arrived at Sanders' facility, then flew. He said he thought that they used Sanders' computer, but because it happened a year and a half ago, he could not swear to it. He said that they set up a check ride with Sanders four to five days before, and Sanders was there when they arrived at his facility and that they flew in Sanders' aircraft later on that day, and that he gave them permission to use it. He said he did not pay anything to Sanders' for use of the airplane on that day, but that he thought that Respondent Jeszka had paid something to Sanders. He said that Sanders has a fixed-base operation at the Jasper airport and has 24-hour self-service fueling. His hangar is locked up at night, but N272TL is often outside the hangar in the daytime with the keys in it. He said Sanders told him he could use the aircraft, but he always called Sanders first before using it. He said he had planned to use the aircraft with Respondent Jeszka three months earlier in 2008 for them to renew their certified flight instructor certificates on the same day, after removal of Respondent Jeszka's feeding tube.

On the Sunday preceding 2/11/2008, Respondent Jeszka told him his son had been arrested and needed his help, and he would not be able to go for the renewals. He said that on 2/11/2008, he and Sanders printed out their applications and temporary certificates. He identified Respondent's Exhibit R-2 as cell phone records for Verizon for his cell phone. The records are in the name of Health

South, a company that he worked for from 1991 to 2002, but he had kept the cell phone and number after he left that employment and paid the bills himself.

He said he was the only person that used his cell phone on 2/11/2008. He said the records show use of his cell phone on calls from Birmingham and Adamsville, which is on route from Birmingham to Jasper in the morning, covering the time Sanders said he arrived at Jasper at 10:00 a.m. He said that Jasper is 35 miles from Birmingham where he lives. He said he flew with Sanders on 2/11/2008 between 12:28 p.m. and 3:23 p.m. in the afternoon, as shown by the absence of any cell phone usage during that period. He said his cell phone records show that he called from Birmingham to Respondent Jeszka's home phone number in Pinson, Alabama, at 7:12 p.m.

He said he had a conversation with Sanders in a parking lot at Sanders' insistence during which Sanders said he thought that his phone was being tapped, and the FAA had come out and looked at records for his Cessna 172. The FAA told him not to talk to anyone. He said his certificate showed that the date of his exam and the flight check was 2/11/08, and that was the day that Jeszka was at his facility. Respondent Ledbetter said he told Sanders that was not right, because Jeszka's feeding tube had not been removed and his son had been arrested. Sanders said he could not change his statement, because the FAA would crucify him. He asked Respondent Ledbetter to say that a letter of discontinuance was issued on 2/11/2008, and the exam and flight test were not completed until

3/28/2008. Respondent Ledbetter said he could not say anything false, and it did not happen that way.

He said the FAA never asked him for his side of the story. He said he had heard his attorney's conversation with Jeff Dockery that day before the hearing and that Dockery had said he did not remember when he had seen the Respondents.
Respondent Jeszka testifying in his own behalf stated that he started flying in 1970 and has been engaged in some kind of aviation work for 38 years, including 12 years most recently as an FAA aviation safety inspector. For the preceding two years prior to his retirement, he was on extended sick leave for treatment of cancer which started out with kidney cancer and required surgical removal of a kidney. Then he was diagnosed with stomach cancer which required removal of his stomach, and eventually surgical insertion of a feeding tube in his abdomen. The feeding tube was removed on February 14, 2008, and he was given a medical release to return to work for the FAA on April 1, 2008. He said that as of 2/11/2008, he was under a medical restriction not to fly, because pressure changes could push the feeding tube out of his intestine and that could cause peritonitis.

Exhibits R-3 and R-4 are letters from Respondent Jeszka's doctors dated 2/14/2008, saying treatment had been completed and the stomach tube had been removed, and he would be able to return to work on April 1, 2008. He said the night of February 9, 2008, his son was arrested by the Birmingham police, and he was not able to bail his son out of jail until February 10, 2008. He said on February 11, 2008, he was arranging for representation of his son, using his home phone in Birmingham and his cell phone. He said he did not go to Jasper, Alabama, at all on that date.

Exhibits R-5 and R-6 are AT&T records of calls to and from his cell phone, which he obtained online from AT&T. The records do not show cell tower origination of the calls and thus do not show where he outgoing calls were placed. He said he had the cell phone with him all day, and no one else used it. The records do not show a period of non-use during which he could have made the flight described by Sanders on February 11, 2008.

He said he had used Sanders' aircraft for currency flights 20 to 25 times over nine years, paying with an FAA credit card. Sanders was always with him for insurance purposes. He said that he flew with Respondent Ledbetter on March 28, 2008, in Sanders' aircraft, N272TL. Respondent Ledbetter had made the arrangement with Sanders to use the aircraft a day or two before, probably by telephone. He said that that morning of 3/28/08 at 8:44 a.m., he had talked with Sanders for 19 minutes using his cell phone, call number 118 on Exhibit R-6. He said that his purpose of the call was to make sure the aircraft would be available that day. He said his cell phone number is 205/913-6905, and the mailing address is Birmingham, Alabama. Later that day, he arranged by telephone call at 2: 20 p. m. to meet Respondent Ledbetter at Sumiton, Alabama, in the Wal-Mart parking lot, so that they could travel together to Jasper, Alabama.

On the way, they discussed the examination process and what information was necessary for reinstatement of his certified flight instructor certificate. Part of the oral test was also accomplished on the way and was finished after they arrived in Jasper, Alabama, where Sanders' plane is kept. The computer work was done in Jasper before the flight and was completed after they returned. He turned off his cell phone for four hours, ending at 6:27, and there were no incoming or outgoing calls during that period. He said he has known Sanders for 12 years. He said Sanders has an FAA designated pilot examiner certification, and Respondent Jeszka was his POI for six or seven years. He said he listened to a telephone conversation between his attorney and Dockery two nights before the hearing and said Dockery said he did not see either of the Respondents getting into or out of an aircraft on either February 11, 2008, or March 28, 2008. He said Ledbetter used a computer at Sanders' facility to input data into the IACRA system on 3/28/08. Respondent Jeszka said the Internet system had come into use while he was on sick leave, and he did not know how to use it. He gave the data to Ledbetter, and Ledbetter put it into the computer and printed a temporary certificate. He said he paid Ledbetter $500 in cash on 3/28 for the flight and identified R-7 as the receipt Ledbetter had given to him. He identified Exhibit R-8 as a copy of a plan of action form that Ledbetter used and filled out on 3/28/2008 and gave to him. The form detailed the plan of action for the oral examination and the practical test on 3/28/08. He said he had been Ledbetter's POI before he got sick and knew that Ledbetter always filled out a plan of action form. He said he signed it on 3/28/08.

Respondent Jeszka said that in February 2009, he received a letter of investigation from Inspector Smith and called Joey Sanders and asked if he had records that he put fuel in his aircraft. Sanders said the FAA had been out looking at flights Respondent Jeszka had taken. He said that his CFI certificate was renewed on the same day theirs were renewed. Respondent Jeszka told Sanders that was not possible, as he had been at home with his son that day. Sanders said he had already told the FAA that it was on February 11, 2008, and suggested that Respondent Jeszka say that there were maintenance problems and Respondent Ledbetter issued a letter of discontinuance, and the flight check was finished on 3/28/2008, and that would take care of it. Respondent Jeszka said he replied that he would not falsify the letter. Respondent Jeszka said that Sanders had a DPE, and that a month ago he had a conversation with Sanders in which Sanders said he was scheduled to do a renewal ride with a new inspector. He said he had already given the FAA the date of February 11, and he was trying to protect Respondent Jeszka. On cross-examination, Respondent Jeszka said his class 2 physical was renewed on May 6, 2008. Joseph Sanders was recalled as a witness for the Respondents. Limited leading questions were allowed, because Sanders was an adverse witness against the Respondent. Sanders asserted that the flight was on February 11, 2008. He said around March 2009, he had been asked by the FAA when the last inspector had used his aircraft, and he said it was the Respondents Jeszka and Ledbetter. He said he did not remember the date, but it was on the same date as his CFI certificate was renewed.

He said that when he saw Respondent Jeszka on 2/11/2008, he was glad to see he had recovered from cancer. He said he had been at the waiting room when Jeszka came out of surgery following removal of his stomach. Sanders said he had once been a OPE for ten years, but he did not seek to renew his certificate because he was having marital difficulties with his wife related to his OPE activities. He said he made $50- to 80,000 a year as a OPE, but he actually lost money because he had to turn down flights for FedEx.

He said he did not rent his aircraft in 2008 and it actually only flew 30 hours that year. He said that Respondents were in Jasper on 2/11/2008 by midmorning or midday. He does not remember exactly. He said that on 2/11/2008, the Respondents took off in his aircraft around noon, and the flight lasted for an hour to an hour and a half, and landed around 2:00 p.m. He acknowledged that Respondent Jeszka could not have been on the flight if his cell phone records showed he used his phone during that period. He said he does not remember if Respondent Ledbetter was in Jasper between 4: 21 p.m. and 6: 30 p.m. He said he does not remember them using his aircraft on 3/28/08, but acknowledged that if they had figured out some way to get it without his knowledge, it would be possible that they did use it. Referring to a telephone call from Respondent Jeszka's cell phone to his cell phone at 8: 44 a.m. on 3/28/2008, he said he remembered that Respondent Jeszka had called about that time and was excited about going back to work. 'He said he remembered seeing a feeding tube through Respondent Jeszka's shirt, but does not remember when. He said he did not notice the feeding tube when he saw Jeszka on

2/11/2008. He said Jeszka had come out to his facility once after the surgery and appeared to be weak and barely able to walk at that time. On cross-examination, he said it was possible to make phone calls while in the air around Jasper from a Cessna 172, but on redirect, he said he did not think it was practical to make a call from a 172 while flying because of the noise.

In rebuttal, the Administrator called Linda Silvertooth. She identified Administrator's Exhibit A-6 as a memorandum she personally gave to Respondent Jeszka when he returned to work at the SDO on April 1, 2008. Among other things, the memorandum to Inspector Jeszka states, "We understand you currently do not hold an FAA airman's medical certificate and that your certified flight instructor certificate has expired. Because of this, I have asked for a temporary position description (PO) titled, Interim Duties, to be prepared and to which you will be detailed. It will allow you to perform duties in the office that are related to your current general aviation operations position description (PD) but the tasks do not require a current airman medical certificate or a certified flight instructor certificate. "Our letter to you dated August 16, 2007, advised you that you have until June 28, 2008, to obtain your FAA medical certificate.

This temporary detail into the interim duties PD will expire on that same date. Please keep me informed as to your progress in this procedure by giving me the status of your medical applications each pay period." A copy of the memorandum was provided to Respondent Jeszka's front-line supervisor, Larry

Dumbrowski, who was also present. She said she had looked in the national PTRS, program tracking system, before lunch on 3/28/08, and knew that his CFI had expired on 10/07.

It was stipulated that there was no record of renewal of his certified flight instructor certificate to see before 6:30 p.m. on 3/28/08. She said she delivered the memorandum personally to Respondent Jeszka in her office on the first day he came back to work and that Larry Dumbrowski read it, and the union representative was there also. She said that Inspector Jeszka did not say that his CFI had been renewed and never told her that before he retired. It was stipulated that he did not tell Dumbrowski either. T.J. Frisch was recalled by the Administrator in rebuttal. He identified Exhibit A-II titled, IACRA Administrative Site User Details, which was admitted by stipulation as a printout of an IACRA data file containing elements of application 163491 by Respondent Jeszka. IACRA or Integrated Airman's Certification of Rating Application is an FAA-operated online application format as opposed to a paper format using FAA Form 8710-1. Respondent Jeszka and Respondent Ledbetter used the online format to file Jeszka's application for a CFI certificate on 3/28/08. This document was not disclosed by the Administrator to counsel for the Respondent until after Sanders had been recalled and testified during the Respondent's case in chief, even though it was in the possession of counsel for the Administrator before that. Because of this, in part, the Respondent was allowed an opportunity to present surrebuttal and to recall witness Sanders.

With the agreement, albeit perhaps reluctant, of counsel, Sanders was recalled on Thursday, May 14, 2009, in Atlanta, Georgia, which is today. The parties stipulated that the printout Form 8710, pages 4 and 5 of Exhibit A-II, were prepared by the IACRA program from data in the file and is the same as the paper Form 8710-1 contained in Respondent Jeszka's airman file. In the table on page 1 of Exhibit A-II, application event type and event date, the table shows that the application was started at 8:23 a.m., 3/28/2008, and was electronically signed and submitted by the applicant at 12:13 p.m., and later signed by the designated examiner conducting the evaluation at 5:52 p.m., on 3/28/08. Times are the server time in Oklahoma City, Oklahoma. Both Alabama and Oklahoma City are in the Central time zone.

The data on pages 3 and 4 of Exhibit A-II were inputted into the system by computer by the applicant or the examiner. Applicants and designated pilot examiners have to register to use the system. The applicant as shown on page 3, 8710 data, was Respondent Jeszka of Pinson, Alabama. The place of the examination is shown as Walker County, Bellville Field, Jasper, Alabama. The e-signature of the applicant, Respondent Jeszka, is dated 3/28/2008. The duration of the oral examination is shown as three hours. The flight portion is shown as 1. 5 hours. The aircraft used is listed as a C-172M, designation number N272TL. The witness said that only the examiner could have loaded the data into the system. The date of the DE's signature is 3/28/08. The examiner's report on page 5, which is the back of Form 8710, was completed by

Respondent Ledbetter and was printed out from the data in the file.

There was a second application started at 9:45 a.m., but it was not completed. An applicant can have more than one application pending at the same time. The system tracks every application submitted, whether completed or not, witness Frisch said a unique identifier is assigned each time an application is initiated. An examiner has a log-on identifier, but he would have to know the unique application identifier number to access it. The designated examiner has to electronically sign the application. He said it is common for an applicant to start an application before the examiner becomes involved. He said that it was not possible to tell from the FAA's computer system where the data was transmitted from.

A chart at the top of page 1 shows that Respondent Jeszka registered as a user for this system on 10/9/2003. His log-on name is listed on line 3. Witness Frisch said the system went into effect in early 2004, and the applicant received a security password when he registered with the system, but that he later could have changed or altered it. Witness Frisch said that not all FAA aviation safety inspectors are registered on the IACRA system and that in his jurisdiction, most still use paper. Once an examiner signs off on an application, a tracking record is electronically forwarded to airman certification, and a permanent certificate is processed.

Respondent Edward Jeszka was recalled in surrebuttal. He said he presumes Exhibit A-11 is accurate and that it must have been started at his house at 8:23 a.m. and was signed by him at 12:13 p.m., and by Ledbetter at 5:52 p.m. He said he could not remember exactly what happened that day, a year earlier. He said he did not remember what happened at 9: 45 a .m. with respect to starting another application. He said it was the first time he submitted anything on IACRA and that it was difficult for him, and he does not now remember any specifics about what he did. He said he does not remember if he started it at home, but that it looks like he would have had to have started it at home at 8:23 a.m. in the morning. He said he still remembers it would have been in the afternoon, about noon instead of 2:00 p.m., but he does not remember when he completed it. He said he did not know how to use the system, and he spent a lot of time that morning talking to Respondent Ledbetter, Joey Sanders, and others, trying to get help in filling it out.

Based on conversation he has had with him, Respondent Ledbetter apparently came to the house to help him finish the application, although he does not remember that specifically. He said that it took the better part of four hours to fill it out. He said he thought he started the application at 2:00 p.m., as he testified the day before, and does not remember it taking place at noon, nor does he remember starting it at home. He said he remembers having had a difficult time with the application and that after the check ride, he sat down with Ledbetter in the upstairs of Sanders Aviation building, and they finished it. Respondent Ledbetter signed and submitted it and gave him a temporary certificate, which he signed.

He said that Exhibit A-6 is a memorandum given to him by Ms. Silvertooth on 4/1/2008, the first day he returned to work. He said he was called by Dumbrowski to Ms. Silvertooth's office, and he asked his union representative to come. He said he was taken aback by having three months to get his medical certificate only. It had taken him a year to get his medical certificate back after his first cancer operation. He said he read the other items, but they did not mean much to him in light of the deadline for getting his medical certificate or he would be out of work, and he does not recall. On cross-examination, he said that Sanders had a meeting room in his building on the upper floor, but he does not recall if Sanders was there, but thinks that he might have been there, because there was some sort of a computer glitch. He said he retired on June 30, 2008, and started the processing for retirement at the end of May. He said he decided to retire, because he thought the work environment was hostile and was not doing his health any good. He said he got his medical on May 6, 2008, but that he had to go to the Mayo Clinic to get it at his own expense. He said he had already decided to retire by then.

He said he was not focusing on the CFI certificate, and he did not think he should say anything because he was astounded by the impossibility of the task that had been placed before him to get his medical certificate by June 2008.

Joseph Sanders was recalled in surrebuttal on May 14, 2008, in Atlanta, Georgia, by the Respondents. He repeated that he did not remember the Respondents using his aircraft after 2/11/2008 until Respondent Jeszka used his Baron during the summer of 2008, after he had retired from the FAA. He said that it is possible that they used his aircraft without his knowing it or approving it, but the airport is a small general aviation airport with one runway and 50 or less flights a day and he would have heard his aircraft start if it was parked outside the hangar.

He acknowledged that on typical days, he was in and out of his FBO. He said that there are one or more computers connected to the Internet on the first floor level of his FBO which is always open to pilots for their use. He said that if the Respondents were using a computer in Jasper that day, it would likely have been his.

II. CASE AUTHORITY

The elements of the charge of intentional falsification are a false statement made in reference to a material fact, with knowledge of the falsity of the fact. Hart v. McLucas, 535 F.2d 516, 519, 9th Circuit (1976). Proof of fraud requires proof with two additional elements: an intent to deceive and action taken in reliance upon the representation. Twomey v. NTSB, 821 F.2d 63, 66, 1st Circuit (1987). In order for a statement to be material, it need only be capable of influencing the decision of the Agency. Twomey v. NTSB, supra, 66; Administrator v. Cassis, NTSB Order Number EA-1831 (1982); Administrator v. Anderson, NTSB Order EA 4564 (1997); Administrator v. Richards, NTSB Order Number EA-4813 (2000); Administrator v. Dillman, NTSB Order Number EA-4513 (2000), citing Administrator v. McGonagall, NTSB Order Number EA-5334 at 4 (2006); Administrator v. Reynolds, NTSB Order Number EA-5135 at 7 (2005); Janker v. Department of Transportation, 925 F.2d 1147, 1150, Ninth Circuit (1991). In the recent case of Administrator v. Dillman, supra, the Board also said that for purposes of evaluating whether a statement has been made with knowledge of the falsity, the proper inquiry is whether the Respondent provided the incorrect answer while cognizant of its falsity, and not whether he had any specific intent to deceive or falsify at the time the answer was provided.

Recent Board precedent uniformly holds that making an intentional false statement of material fact shows lack of qualification to hold a certificate and that the appropriate sanction is revocation. Administrator v. Hodges, NTSB Order Number EA-5303 (2007), and the cases cited therein. In Administrator v. Hodges, supra, the Board noted that it has held that falsification of required documents constitutes a lack of qualification to hold a certificate.

In that case, the Respondent falsified an application for renewal of her flight instructor certificate and caused another individual to make a false statement. At pages 9-10, the Board quoted language from Administrator v. Coughlan, NTSB Order Number EA-5197 (2005), citing Coughlan v. NTSB, 470 F.3d 1300, 1306, 11th Circuit (2006), stating that, "Few violations more directly call into question the pilot's nontechnical qualification than do those involving falsifications, and few falsifications more clearly threaten air safety than do those involving an airman's entitlement to advanced certificates or ratings." In Administrator v. Arizona Avionics, LLC, NTSB Order Number EA-4861 (2000), the Board upheld the law judge's refusal to allow without proper foundation on character evidence or evidence of reputation for truth and veracity, noting that the Federal Rules of Evidence generally forbid the admission of evidence of a person's character or trait of his character for the purpose of proving that he acted in conformity therewith on a particular occasion.

The Board's decision in Administrator v. Aviance International Inc., et al., NTSB Order Number EA-3805 (1993) involves, among others, several issues bearing some similarity to those in this case, and the Board's observations in that case are applicable here. The Board said that the issue in falsification cases is usually whether the individual who made the false statement did so intentionally, and almost invariably, that is established circumstantially since direct evidence of intention is rarely available.

Where, as in the Aviance case, the issue is not whether there was an intentional falsification but whether there was a falsification at all, the Administrator's proof must be more compelling. The Board found in Aviance that there was no direct evidence of falsification and held that circumstantial evidence was insufficient to prove the falsification charge. The Board noted that the law judge drew his conclusion of falsification from the inability of several air traffic controllers to recall any training flights at issue in the Aviance case. The Board said that it had no doubt that at an airport of light to moderate traffic activity, that the controllers would likely be cognizant of most, if not all, of the operations conducted there, but since it seemed to the Board that at least some training flights had been conducted, despite the controllers' contrary recollections, the Law Judge should not have accorded such heavy weight to their recollections. The Board in the Aviance case reversed the falsification findings.

III . FINDINGS AND CONCLUSIONS

From the evidence adduced during the hearing, it is apparent, and I so find, that this case to a very significant degree turns on credibility or lack thereof of the three main witnesses, Joseph Gordon Sanders, Respondent Ledbetter, and Respondent Jeszka. Sanders testified that Ledbetter and Jeszka were at his facility in Jasper, Alabama, on 2/11/2008 for the stated purpose of renewing their certified flight instructor certificates, and that to his knowledge, they did not use his aircraft on 3/28/2008 for any purpose. He said he did not recall that Respondents Ledbetter and Jeszka were at his facility at all that day, or that Jeszka flew with Respondent Ledbetter in N272TL on 3/28/08 as they testified. He said he did not have any recollection that they completed the practical test on Sanders' aircraft on 3/28/08 as stated on Respondent Jeszka's application and temporary certificate.

These two contradictory versions of events are irreconcilable and cannot reasonably be rationalized. To put it simply, both versions of events cannot be true. There is no dispute that Sanders and Respondent Ledbetter renewed each other's certified flight instructor's certificates on 2/11/08, but no directly on-point tangible records, such as aircraft records or flight logs, have been produced which would tend to support when Respondent Jeszka's CFI certificate was renewed, other than the computer records in Exhibit A-11 and a copy of the Form 8710-1 which is attached, which is the same as the copy attached to Exhibit A-II, which shows the date of renewal to be 3/28/08.

Thus, it all comes down to a question of who should be believed. At the outset, I note that there were references, which I did not allow to be pursued, to other problems between the FAA and the Respondents, and perhaps between the FAA and Sanders also. None of this is charged in the complaint and is irrelevant in this proceeding. The issue here is simply who is telling the truth and who is not, whether or not the Administrator is able to carry her burden of proof by a preponderance of the evidence that Respondent Jeszka did not take the examination to renew his certified flight instructor certificate on 3/28/2008 in N272TL, as both Respondent Jeszka and Respondent Ledbetter testified and certified on the IACRA records.

There is strong evidence suggesting that all three of these principal witnesses are long-time friends who have had a close relationship to each other over a long number of years. The testimony indicates that Sanders, for example, has known Respondent Ledbetter for 30 years and Respondent Jeszka for ten to twelve years, and that Jeszka rented his aircraft prior to 2008 frequently on a FAA credit card for flight checks.

There is a dearth of evidence as to the contents of the practical examination purportedly given by Sanders and Ledbetter to each other on 2/11/2008, and by Ledbetter to Jeszka on 3/28/2008. Whether they were complete or perfunctory is something that is known only to them, but within the time frame available to conduct an oral examination and flight check on 3/28/08, there is a significant possibility that any practical test given or taken by Respondent Ledbetter or Respondent Jeszka were perfunctory at best.

That is not an issue, however, as the Administrator charges that there was no flight check conducted by Respondent Ledbetter of Respondent Jeszka in Sanders' aircraft, N272TL, on 3/28/08 as Jeszka's application for renewal of his EFI certificate, which was filed electronically with the FAA, states and which Respondent Ledbetter certified on the same application. I find little evidence of a motive for Sanders to lie about when Respondent Ledbetter gave a practical test to Respondent Jeszka or about their use of his aircraft N272TL on 3/28/08. He had no personal involvement in the giving of the practical test, and even when or if it was given made no difference to him personally. He did not testify that he had personal knowledge that the test was given on 2/11/2008, only that giving the practical test was the stated reason for the flight, but he does not know what actually took place during the flight, because he was not on board of the aircraft.

Thus, it is not an issue in this proceeding raised by any evidence of record that the Respondent Ledbetter might have begun his renewal examination for issuance of a certified flight instructor's certificate to Respondent Jeszka on 2/11/2008 but did not complete it until 3/28/2008. I see no reason why Sanders would want to conceal that Respondent Ledbetter and Jeszka used his aircraft on 3/28/08. Again whether or not they did or did not use it makes no personal difference to him. He has no evident personal stake in the outcome of the case, and it is of no concern to him when, if ever, Respondent Jeszka took a practical test to renew his certified flight instructor certificate. Despite suggestions from the Respondents to the contrary, there is no evidence that Sanders was virtually paranoid about the FAA or felt that it was out to get him. Sanders said he did not seek to renew his DPE when it expired at the end of 2008, and there is no evidence that he did or that he was waiting for a check ride in February 2009 to renew his DPE and that a favorable outcome of his application could be a motive for him not to tell the truth about the Respondents and their claim to have used his aircraft on 3/28/08.

Could his aircraft have been used by the Respondents without his knowledge on 3/28/08? Possibly, but not at all likely. There is no evidence that the Respondent was not at his place of business at the Walker County Airport where his FBO and his aircraft were located. He checked his records, and he was not flying for FedEx that day. He did acknowledge that typically he was in and out of his FBO during the day, but he said he had no reason to recall events on the specific date of 3/28/2008, and he denied that the Respondents had made advance arrangements with him to use his aircraft on that date or had telephoned him that morning to make sure the plane was available.

As a fixed-base operator at a very small general aviation airport with 50 or less takeoffs and landings a day and one runway that passed in front of his building, it appears very improbable that it would escape his notice that his aircraft had started while in front of his building and had taken off without his knowledge or permission, or that the Respondents, both of whom he knew very well, were in his building using his upstairs office and the computer on 3/28/08 without him seeing them on that date.

The credibility issue presented here insofar as the Respondents are concerned is that they testified that they made advance arrangements to use Sanders' aircraft on 3/28/08 and called him to confirm that morning and he was at the FBO and talked to them that day. The Respondents cannot have it both ways, that they used his aircraft with his permission and knowledge, but maybe he was not there and/or forgot that they used his aircraft.

Sanders maintained consistently in both his testimony and his rebuttal testimony and surrebuttal testimony that he has no memory that his aircraft was used by the Respondents on 3/28/08, or that he had been called on that day or a few days before that about their using it. That, of course, is not as positive as an outright, unequivocal denial, and the Respondents have testified, also consistently, that he did know that they used his aircraft on 3/28/08 but will not admit it, apparently out of fear of reprisals from the FAA. If he did know, as the Respondents contend, that means, of course, that he has lied under oath at this hearing when he denied such knowledge. I see no reason why he would run the risk of being found lying under oath about something in which he had no interest in the outcome. He waffled at times on the exact time that the Respondents arrived at his facility in Jasper on 2/11/2008, but remained consistent in his testimony that they did arrive in the morning, and at about noon, they took off in his aircraft together, and they were gone for about an hour and a half.

I do not find some uncertainty as to precise times of day to be an indication of untruthfulness, as memories may fade over the period of a year or more, and in any event, what did or did not happen with respect to Respondent Jeszka on 2/11/2008 is not an issue in this case. There is no evidence whatsoever that Respondent Ledbetter administered a practical examination to Respondent Jeszka on 2/11/2008 or any portion thereof. Sanders did not see an oral examination being administered and does not know what took place during the plane ride by the two Respondents in his aircraft, supposedly on that day.

There are no FAA records that a practical test for a CFI certificate was administered to Respondent Jeszka by Respondent Ledbetter on that date, 2/11/2008, or was begun on that date and finished on 3/28/2008. And as noted, the Respondents themselves disavow that there was any examination conducted on 2/11/2008 or that Respondent Jeszka was even present at Sanders' FBO on that date.

As I have noted, the issue here as raised in the complaints is what happened or did not happen on March 28, 2008, with regard to the administration by Respondent Ledbetter of a renewal practical examination for issuance of a certified flight instructor certificate to Respondent Jeszka.

As noted by counsel for the Administrator, proving a negative is generally much more difficult than proving a positive. The most significant evidence on this point is the testimony of Sanders that

Respondents did not use his aircraft on 3/28/08, contrasted with the testimony of the Respondents that they did use it on that date with Sanders' permission and knowledge, for the purpose of Ledbetter administering a practical test for a CFI certificate to Jeszka.

There are computer records filed online with the FAA, indicating that Respondent Ledbetter conducted a practical examination on 3/28/08 and issued a temporary CFI certificate to Respondent Jeszka on that date, but there is little other corroborative evidence and some significant rebuttal evidence produced by the Administrator raising considerable doubt about the credibility of the Respondents' testimony to that effect, and in the online application they filed, that a practical examination took place on that date.

As already noted, that squarely raises credibility as the determining factor. Who is more credible, the Respondents or Sanders? I've already discussed the factors affecting Sanders' credibility or lack thereof. Now I will consider what factors affect the credibility or lack thereof of the Respondents. With regard to a possible motive for falsification, Respondent Jeszka was within days of returning to work as an ASI after a long period during which he was on sick leave, while he successfully battled two bouts with life-threatening cancer.

And as a former FAA principal operations inspector who supervised designated pilot examiners, it is reasonable to conclude that he well knew that he needed to have a current CFI certificate to perform his duties when he did return to work for the FAA.

He contends that three days before his return to duty, he obtained his CFI certificate from his long-time friend, Respondent Ledbetter, who was a designated pilot examiner he had formerly supervised.

The incongruity is that after going to that trouble and obtaining the CFI certificate he needed, why did he conceal that fact from the FAA. and not simply on his first day back at work notify Ms. Silvertooth and his immediate supervisor at the Flight Standards District Office that he had already completed the requirement that he have a current certified flight instructor's certificate and there remained only the need to obtain a medical certificate to which he could devote his full attention before he could be restored to full duty.

Instead, for reasons that he did not rationally explain, he never mentioned that he had a CFI certificate to anyone at the FAA, including Ms. Silvertooth or his supervisor, up to and including apparently the day he retired in June 2008. A more illogical thing for him to have done is hard to even imagine. His failure to do so creates grave doubts about his credibility, and whether there was a practical examination conducted by Respondent Ledbetter on 3/28/08 at all.

Further impeaching Respondent Jeszka's testimony is Exhibit A-II, the IACRA report, which establishes that contrary to his testimony, the electronic filing of his application on the FAA's IACRA system began in the early morning of 3/28/08, and his part was completed by about noon, rather than having been started and completed after 2: 00 p.m. in the afternoon, as both he and Respondent Ledbetter testified. He offered no rational explanation for this discrepancy when he was confronted with it at the hearing.

If, as appears to be the case, he actually started the application and finished it at home,' and accepting his contention that he required assistance from Ledbetter to complete his part of the application, that places in doubt the necessity of him calling Ledbetter to arrange to meet him midway to Jasper so that they could travel together. They were together apparently or talking on the phone apparently that morning. That discrepancy also raises significant questions concerning his candor, truth and veracity. I note that there is no evidence that Respondent Jeszka either paid or offered to pay Sanders for use of his aircraft on 3/28, not even to the extent of offering to pay for fuel usage. Aircrafts do not fly for free and incur fuel and maintenance costs every time they fly. That can hardly be disputed. Respondent Ledbetter said that he was paid $500 by Respondent Jeszka for flight on 3/28/2008 and produced a receipt to that effect. He said he thought that Respondent Jeszka had paid something to Sanders for use of the aircraft that day.

However, Respondent Jeszka did not testify that he did so, nor was Sanders even asked if he receive any monetary compensation from Respondent Jeszka for the flight on 3/28/08. This raises doubt that the use of Sanders' aircraft on 3/28/08 occurred at all, as there is no logical reason why Sanders should bear the cost of the flight himself if it occurred.

Motive is something best known to the persons involved and most often cannot be proven by direct evidence but only by circumstantial evidence. The most likely explanation for Respondent Ledbetter's falsification of the use of Sanders' aircraft on 3/28/08 is that he did not administer a practical examination on that date, but filed a false online report that he did to accommodate his long friend, Respondent Jeszka, who was returning to work as an ASI after years of battling cancer and needed a CFI certificate.

It is clear that Respondent Jeszka could not have obtained the CFI certificate on 3/28/08 without the full cooperation and participation of Respondent Ledbetter who certified online on the FAA's IACRA system that he had conducted the practical examination and issued a temporary certificate to Respondent Jeszka on 3/28/2008. Further adversely affecting Respondent Ledbetter's credibility is his inconsistent testimony that he and Respondent Jeszka rode together on 3/28/2008 to Sanders' FBO in Jasper between 2:24 p.m. and 4:21 p.m., during which time he administered the oral portion of the application to Respondent Jeszka, and that they finished entering his portion of the application online after they arrived at Sanders' FBO in Jasper, Alabama, using Sanders' computer in his private office, then flew the check ride.

The IACRA records show that Ledbetter signed the application at 5:52 p.m. on 3/28. However, the testimony I have just mentioned was flatly contradicted by Administrator's Exhibit A-11 which shows that Respondent Jeszka completed his online application by about noon. There was nothing left for Respondent Ledbetter or Respondent Jeszka to do online when they said they arrived in Jasper at 4:21 p.m., until after the check ride that they claim took place was over at 5:23 p.m.

Respondents argue that Ledbetter's cell phone records on 3/28 place him using his cell phone in Jasper, Alabama, in the afternoon of 3/28/08, and that supports the testimony of both of them that Sanders is, at the very least, mistaken that they did not use his aircraft on 3/28/2008. That evidence, however, appears to be equivocal, as these telephone records in and of themselves do not establish why the persons who used the phone were in Jasper, if indeed both of them were there or what the telephone calls were about.

For example, one obvious possibility, which is, of course, not susceptible to direct proof, is that Ledbetter and Jeszka arrived unannounced with no advance planning with Sanders, intending to use his aircraft, but found that Sanders was not there, and finding they could not fly in his aircraft, simply resolved the problem by Ledbetter filing a false online report on the IACRA system that they had flown in Sanders' aircraft to do the check ride for Respondent Jeszka's certified flight instructor certificate.

Is that what happened? There's no way to know by any direct evidence, so it remains only another possibility for explaining what Respondent Ledbetter was doing in Jasper that day. It does not rise to the level of proof to impeach Sanders' testimony, that he has no recollection of the Respondents using his aircraft at any time after 2/11/2008 until Respondent Jeszka used his Baron in the summer of 2008, after he had retired from the FAA. During the hearing it is evident that both Respondents recognized that they needed to discredit the testimony of Sanders which contradicts their testimony that they used his aircraft on 3/28/08 for the practical test of Respondent Jeszka. To that end, they testified to damaging admissions · they said that Sanders made to them after the fact, to the effect that he did not want to admit to the FAA that he had made a mistake in dates, because he feared that would prejudice his application to the FAA to renew his OPE certificate.

But there is no independent proof that Sanders had applied for renewal of his OPE, and Sanders testified, with no apparent reason to lie, that he did not apply for renewal of his OPE and no such application was pending with the FAA. Moreover, I have had the opportunity of hearing and viewing the testimony of Sanders and both the Respondents. I observed that Sanders delivered his testimony in a straightforward manner, without going back on his contention that he had no memory of seeing the Respondents at his place of business on 3/28/08, or having any discussion with them or allowing them or even knowing that they were going to use his aircraft on that date. Considering the conditions already described that existed at Sanders' FBO on 3/28/08 and his unshaken testimony that he had no contact with the Respondents before or on that date about their use of his aircraft, it is an eminently reasonable conclusion and I so find that if his aircraft had been used as they contend, it is more likely than not that he would remember it. His repeated testimony that he did not remember that to have occurred is functionally the equivalent to an outright denial.

I have also observed and heard the testimony of the two Respondents. I note parenthetically here that Respondent Jeszka appears to be under considerable emotional strain because of his illness, and understandably so. However, Respondent Ledbetter does not appear to be under any similar emotional strain. In their testimony, both Respondents appeared more intent on discrediting Sanders, who they thought to be their friend but who gave very damaging information to the FAA against them, than in providing corroborating details to support their claim that notwithstanding Sanders' denial, they used his aircraft on 3/28/2008 for Jeszka's CFI practical examination.

For example, they provided no details concerning the contents of the practical test and oral examination that Respondent Ledbetter said that he administered on 3/28/08 and Respondent Jeszka said he took on that date. No convincing evidence has been offered concerning the discrepancy in the time of initiating and completing the online application by Respondent Jeszka as disclosed by the IACRA records, as compared to Respondent Jeszka's testimony as corroborated by Respondent Ledbetter.

Respondent Ledbetter said only that they completed the online application when they arrived at Sanders' facility in the afternoon. He offered no explanation for how the FAA's IACRA records could show that the application was started at 8:23 a.m. and finished at 12:21 p.m., so that there was nothing left to complete when they arrived at the facility of Sanders in the afternoon of 3/28/08, nor did he confirm or deny that he had spoken by telephone or in person with Respondent Jeszka earlier that day about how to complete the application.

Respondent Jeszka offered no explanation for the discrepancy, other than to say he does not now remember when he started the application process, other than it was about 2: 00 p.m. but conceded that the IACRA records, Exhibit A-11, show otherwise. Further, I note that Respondent Jeszka presented no logical or convincing explanation for not reporting to the FAA, his employer, that he had a current CFI certificate when he returned to duty after a long illness on April 1, 2008.

I conclude and find that Respondent Ledbetter and Jeszka are not credible witnesses as to their claim that Ledbetter administered a CFI practical examination on 3/28/2008 using Sanders' aircraft N272TL as stated on the online IACRA application that they both filed and signed. On balance, I find that Sanders is by far the more credible witness with the least to gain or lose from the result of this hearing.

I give little or no weight to the testimony of witness Dockery who I find to have intentionally tried to minimize his involvement in his statements to the FAA, and therefore, not to be a credible witness. In any event, his testimony related only to a peripheral issue in this case, not necessary or relevant to the critical issue of what happened on 3/28/2008.

I find that the Administrator has proven by a preponderance of the evidence that as alleged in the complaints, the Respondent Ledbetter violated FAR Section 61. 59 (a) (2) by making or causing to be made a fraudulent or intentionally false entry on a temporary airman flight instructor certificate he issued to Edward Thaddeus Jeszka, and that Respondent Jeszka violated FAR Section 61. 59 (a) (2) by making or causing to be made a fraudulent or intentionally false entry on a temporary airman flight instructor certificate issued to him by Raymond Arthur Ledbetter, all on 3/28/2008.

I find that the evidence produced by the Administrator is sufficient to establish that each of the three elements of the charge of intentional falsification as set out in Hart v. McLucas, supra, and the other cases cited, to wit, an intentional false statement made in reference to a material fact with knowledge of the falsity of fact, has been established.

The evidence establishes that the Respondents knowingly made or caused to be made an intentional false statement on an application for a temporary CFI certificate for Respondent Jeszka submitted to the FAA electronically on 3/28/2008, to wit, that a practical test was administered by Respondent Ledbetter, in civil aircraft N272TL, on that date, when, in fact, as they both well knew, that aircraft was not used by them for that purpose on that date.

Further, the evidence shows that the false statement was material, because it was capable of influencing the action of the FAA, and did, in fact, result in issuance under delegated authority by Respondent Ledbetter of a temporary CFI certificate to Respondent Jeszka.

It is distressing, indeed, to find two airmen of the age of the Respondents, with their long careers in aviation standing found guilty of making intentional false statements. Much as I might wish it to be otherwise, the evidence, however, adduced during the hearing cannot be ignored, and it establishes by a preponderance that the two Respondents acted together and for the joint purpose of making or causing to be made the false statement at issue.

The false statement was essential to Respondent Ledbetter's issuing and Respondent Jeszka obtaining a CFI certificate on 3/28/2008. It could not have happened without both of them knowing about it. Accordingly, I find the Administrator has proven by a preponderance of the evidence that each knowingly made or caused to be made the false material statements alleged in the complaints against him. The situation in this case is distinguishable from that in Administrator v. Aviance, supra. There is no direct evidence here that the flight did not take place, but the circumstantial evidence is more than sufficient to prove that it did not. Under the circumstances of this case, Sanders more likely than not would have been aware of it if the Respondent had used his aircraft for any purpose on 3/28/2008.

It appears that there is only one runway at the airport, and Sanders' building and hangar face the runway. There is no evidence that he was not at the airport that day. In fact, even the Respondents contend that he was and that they talked to him by telephone earlier in the day to confirm the aircraft was available.

I find that Sanders, as I have said, is a credible witness, with no motive to lie, and showed every sign of telling the truth, that he does not remember a flight that he would have certain remembered having taken place in his airplane is sufficient to establish that it did not, even though he did not say so unequivocally and with absolute certainty. Even if his recollection of precise dates may be imprecise, he denied that he even discussed, let alone allowed, the Respondents to use his aircraft at any time after 2/11/2008.

As noted earlier in the citations of authority, Board precedent stands squarely for the proposition that making an intentionally false statement shows lack of qualification and warrants revocation of all airmen's certificates held by offenders. Upon consideration of all the substantial, reliable and probative evidence of record, I find that the Administrator has proven by a preponderance of the evidence that Respondents Ledbetter and Jeszka violated FAR Section 61. 59 (a) (2) and Section 61.59 (b) as charged in the complaints against them and lack the qualifications to hold any airman's certificate.

ORDER ACCORDINGLY, IT IS HEREBY ORDERED:

(1) The Administrator's emergency orders of revocation are affirmed;
(2) The Respondents' appeals are denied.

EDITED ON
William A. Pope, Administrative Law Judge
MAY 19, 2009

SERVED: June 17, 2009
NTSB Order No. EA-5458

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 16th day of June, 2009

J. RANDOLPH BABBITT,
Administrator, Federal Aviation Administration,

Complainant,
Dockets SE-18571 and SE-18572
v.

RAYMOND A. LEDBETTER and
EDWARD T. JESZKA,

Respondents.

OPINION AND ORDER

Respondents appeal the oral initial decision of Administrative Law Judge William A. Pope, II, in this consolidated case, issued following an evidentiary Hearing held on May 6, 7, 8, and 14, 2009.[1] By that decision, the law judge affirmed the Administrator's complaint and ordered the revocation of respondents' airline transport pilot certificates, flight instructor certificates, mechanic certificates, and any other airman certificates they may hold, based on a finding that respondents violated 14 C.F.R. § 61.59(a) (2)[2] by making or causing to be made a fraudulent or intentionally false entry on a temporary airman certificate for Respondent Jeszka. Specifically, the Administrator alleged that both respondents conspired to falsify Respondent Jeszka's flight check certification. Respondents appeal the law judge's order. We deny respondents' appeal.

The Administrator's emergency orders[3] against Respondents Ledbetter and Jeszka, issued on April 14 and 17, 2009, respectively, alleged that, on March 28, 2008, Respondent Ledbetter electronically signed and thereby issued a temporary airman flight instructor certificate to Respondent Jeszka. The orders stated that the certificate's date of March 28, 2008 was false in that Respondent Jeszka did not complete a practical test with Respondent Ledbetter on March 28, 2008. As such, the orders alleged that respondents made or caused to be made fraudulent or intentionally false statements concerning the date of issuance on the temporary airman certificate. The orders also stated that, based on this alleged falsification, both respondents lacked the qualifications to hold an airman certificate, and thereby ordered revocation of respondents' certificates, as described above.

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[1] A copy of the initial decision, an excerpt from the hearing transcripts, is attached.

[2] Title 14 C.F.R. § 61.59(a) (2) prohibits any person from making or causing to be made, "[a]ny fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization under this part."

[3] This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52-821.57.

At the hearing, respondents' counsel acknowledged that the date in Block 10 of the application for the certificate must be the date that the applicant completes the practical test. Tr. at 58. In presenting the case-in-chief, the Administrator's counsel called Joseph Gordon Sanders, a friend of both respondents who has run Sanders Aviation, Inc., a fixed-based operator (FBO) at walker County Airport in Jasper, Alabama, since 1998 , to testify. Mr. Sanders stated that both respondents had previously used his Cessna 172, N272TL. Mr. Sanders testified that both respondents came to his FBO on February 11, 2008, to conduct their practical tests; specifically, Mr. Sanders stated, "[Respondent Ledbetter] called and they wanted to come out and renew their flight instructor ratings ... they appeared about 10: 00 [am] on the eleventh of February. " Tr. at 64. Mr. Sanders then stated that both respondents went to Mr. Sanders's computer so that Respondent Ledbetter could renew his certificate and Respondent Jeszka could reinstate his certificate, which had lapsed. Mr. Sanders further testified that two flights took place in N272TL on February 11, 2008: both respondents flew the aircraft, followed by a flight that Respondent Ledbetter and Mr. Sanders conducted.

Mr. Sanders stated that the first flight occurred around 12:00 pm and lasted approximately 60 to 90 minutes. Later that afternoon, Mr. Sanders recalled that Respondent Ledbetter gave him $100 to cover the cost of fuel for the flights. Mr. Sanders testified that he was certain that both of the flights occurred on February 11, 2008, because that is the date on his flight instructor's record. Tr. at 67. Mr. Sanders further stated that he saw the aircraft take off with both respondents in it on February 11, 2008. Tr. at 69-70. Mr. Sanders testified that, after February 11, 2008, neither respondent used N272TL in early 2008. Mr. Sanders stated that the Walker county Airport is very small, and described the location of the hangar that houses N272TL and his FBO; Mr. Sanders testified that the hangar faces the airport's only runway, and that it would consequently be difficult for someone to use N272TL without his knowledge. Mr. Sanders stated that he keeps N272TL locked in his hangar.

The Administrator also provided the testimony of Jeffrey Dockery, who conducted flight school operations for a company that leased a portion of Mr. Sanders's building. Mr. Dockery stated that, in February and March of 2008, he worked in the building 7 days each week. Mr. Dockery stated that he had reviewed his logbook to recall his schedule on February 11, 2008, and determined that he had seen respondents and knew the engine of N272TL was warm that day. On cross-examination, Mr. Dockery acknowledged that he had previously told the FAA that the flight occurred "sometime in the month of February, 2008." Tr. at 103, 105; Exh. R-1.

The Administrator also called Linda Silvertooth, the office manager of the Alabama/Northwest Florida Flight Standards District Office (FSDO), to testify. Ms. Silvertooth testified that Respondent Jeszka was employed at the FSDO as an aviation safety inspector who specialized in operations until he retired in June 2008. Ms. Silvertooth stated that, according to Respondent Jeszka's schedule and leave records, February 11, 2008, would have been a regular work day for Respondent Jeszka, and March 28, 2008, would have been a regular day off. However, until April 1, 2008, Respondent Jeszka was on sick leave and was receiving leave under the Voluntary Leave Transfer Program; as such, MS. Silvertooth testified that it would have been improper for Respondent Jeszka to complete a check ride during what would have been a regular work day, as Respondent Jeszka was receiving sick leave for that day. However, the check ride would be permissible on March 28, 2008, because Respondent Jeszka's schedule provided that March 28 would have been a regular day off. Tr. at 118. Ms. Silvertooth also clarified, however, that it was improper under FAA rules for an inspector like Respondent Jeszka to take a check ride with Respondent Ledbetter, because Respondent Ledbetter was a designated pilot examiner (DPE) from within Respondent Jeszka's district, and Respondent Jeszka oversaw Respondent Ledbetter as his principal operations inspector. Tr. at 121.

In response to the Administrator's case, both respondents testified. Respondent Ledbetter stated that he had known Mr. Sanders for 30 years, and is familiar with Mr. Sanders's FBO. Respondent Ledbetter testified that Mr. Sanders does not keep

N272TL locked in his hangar. Respondent Ledbetter also stated that, on February 11, 2008, Mr. Sanders renewed Respondent Ledbetter's flight instructor certificate, and Respondent Ledbetter in turn renewed Mr. Sanders's flight instructor certificate. Respondent Ledbetter stated, however, that Respondent Jeszka was not present at the FBO on February 11, 2008. Respondent Ledbetter clarified that Respondent Jeszka was occupied with assisting his son with legal issues on February 11, 2008; Respondent Ledbetter also stated that Respondent Jeszka was not permitted to fly on February 11, 2008, anyway, because Respondent Jeszka's doctor had not removed a feeding tube that Respondent Jeszka had in place at the time. Tr. at 136, 142. Respondent Ledbetter opined that Mr. Sanders had provided false information to the FAA, because Mr. Sanders erroneously recalled that Respondent Jeszka had been present on February 11, 2008. Respondent Ledbetter stated that, when he reminded Mr. Sanders that Respondent Jeszka was not there, Mr. Sanders did not want to change his story, and encouraged Respondent Ledbetter to provide information to the FAA that was complicit with the synopsis that he had provided to the FAA. Respondent Ledbetter further stated that no one completed Respondent Jeszka's application on Mr. Sanders's computer on February 11, 2008, but that both respondents filled it out on March 28, 2008.

In support of his testimony, Respondent Ledbetter provided telephone records indicating that he was in Birmingham, Adamsville, and Jasper, Alabama, on February 11, 2008. Exh. R-2. Respondent Ledbetter stated that the records show that he completed his own check ride in the afternoon on February 11, 2008, and that he was again in Jasper for Respondent Jeszka's check ride at 4:21 pm on March 28, 2008. Tr. at 159. Respondent Ledbetter recalled that Mr. Sanders was present on March 28, 2008, when respondents borrowed N272TL, and that he had a conversation with Mr. Sanders that day. Respondent Ledbetter could not recall the subject of the conversation. Tr. at 162. Respondent Ledbetter stated that he did not pay Mr. Sanders after the flight on March 28, 2008, but that he believed Respondent Jeszka had given Mr. Sanders some money for fuel. Respondent Ledbetter did not recall where the aircraft was located when he and Respondent Jeszka arrived at the airport on March 28, 2008, and could not remember if respondents used Mr. Sanders's computer on March 28, 2008. Tr. at 165.

Respondent Jeszka also testified at the hearing, and stated that he had taken sick leave before retiring from the FAA because he had kidney and stomach cancer, and had undergone extensive treatment. After a surgery that resulted in the removal of his stomach, Respondent Jeszka testified that he had a feeding tube. Respondent Jeszka provided medical records indicating that he could return to work on April 1, 2008, and that his feeding tube was removed on February 14, 2008. Exhs. R-3 and R-4. Respondent Jeszka testified that flying with the feeding tube in place was not possible, because the act of flying could cause the feeding tube to become dislodged and result in serious injury. Respondent Jeszka also stated that, on February 11, 2008, he was meeting with an attorney, and had not gone to Mr. Sanders's FBO in Jasper. Tr. at 197-98. Respondent Jeszka testified that Respondent

Ledbetter set up a time to meet Mr. Sanders on March 28, 2008, and use N272TL, which Mr. Sanders kept out on the ramp at the airport with the keys in it. Tr. at 206-208. Respondent Jeszka provided additional telephone records showing that he called Mr. Sanders on March 28, 2008, and that they spoke for 19 minutes. Tr. at 209; Exh. R-6. Respondent Jeszka stated that the purpose of the call was to confirm that he and Respondent Ledbetter could use N272TL on March 28, 2008. Respondent Jeszka also testified that he met Respondent Ledbetter at a centrally located store before they traveled to Jasper together for the flight. Respondent Jeszka stated that the flight concluded around 6:30 pm, at which time both respondents made phone calls. Tr. at 214. Respondent Jeszka testified that he used a computer at Mr. Sanders's FBO on March 28, 2008, and that Respondent Ledbetter entered the data into the online Integrated Airman Certification or Rating Application (IACRA) form on Respondent Jeszka's behalf, because Respondent Jeszka was not familiar with the IACRA system. Tr. at 226-27. Respondent Jeszka also identified a "Plan of Action" for the flight that Respondent Ledbetter drafted and Respondent Jeszka signed. Exh. R-B. Respondent Jeszka testified that Respondent Ledbetter gave him a copy of the form on March 28, 2008. Respondent Jeszka also testified that Mr. Sanders suggested that Respondent Jeszka lie about being present at the February 11, 2008 flight check. Tr. at 238. Finally, Respondent Jeszka also testified that he renewed his medical certificate on May 6, 2008. Tr. at 252.

Respondents' counsel also called Mr. Sanders in respondents' case-in-chief. Mr. Sanders stated that he did not recall the exact time on February 11, 2008, at which respondents were at his FBO for the flight check. Tr. at 261. Mr. Sanders reiterated that he did not recall respondents using his aircraft on March 28, 2008. Tr. at 277. Mr. Sanders agreed that it was typical for Respondent Ledbetter to call him a day or two in advance of an intended flight in N272TL, and acknowledged that telephone records indicate that Respondent Ledbetter called him on March 27, 2008.

In rebuttal, the Administrator's counsel again called Ms. Silvertooth to testify. Ms. Silvertooth identified a memorandum that she gave to Respondent Jeszka upon his return to the FSDO on April 1, 2008. Tr. at 300; Exh. A-6. Ms. Silvertooth stated that the memorandum provided that the FSDO required Respondent Jeszka to obtain his medical and certified flight instructor (CFI) certificates, and that Respondent Jeszka did not inform her at any time that he had already reinstated his CFI certificate.

The Administrator also provided IACRA data showing that Respondent Jeszka had begun his application for renewal of his certificate at 8:23 am on March 28, 2008, and that the examiner electronically signed the application at 5:52 pm on March 28. Tr. at 333, 357; Exh. A-II. T. J. Frishe, who works with IACRA data at the FAA, testified that the data concerning Respondent Jeszka's application indicated that someone had begun the application twice. Mr. Frishe stated that the system cannot identify the location from which the data is transmitted.

The law judge allowed respondents to provide additional evidence *in* surrebuttal. Respondent Jeszka testified again, and acknowledged that the IACRA data indicates that he began the application on 8:23 am on March 28, 2008, and electronically signed it at 12:13 pm that day, and that the data shows that Respondent Ledbetter electronically signed the application at 5:52 pm on March 28. Respondent Jeszka opined that he may have begun the application at his house while on the phone with Respondent Ledbetter and Mr. Sanders. Tr. at 390-91. Respondent Jeszka then stated that, "[Respondent Ledbetter] ultimately apparently came by my house and we finished it, because he has to be present when I signed this thing." Tr. at 392. Respondent Jeszka testified that he and Respondent Ledbetter completed the application at Sanders Aviation after the check ride, but could not recall whether Mr. Sanders was present when they completed it. Respondent Jeszka also stated that the reason he did not inform Ms. Silvertooth that he had already reinstated his CFI was because he was taken aback by the statement in the memorandum that he would need to regain *his* medical certificate within only 3 months, and that the concern c er his medical certificate took priority.

Respondents also called Mr. Sanders to testify again. Mr. Sanders reiterated that he did not recall respondents being at his FBO on March 28, 2008, that the airport is a small facility, and that he could h ear aircraft taking off and landing from his FBO. Mr. Sanders stated that he did not remember whether anyone used N272TL without his permission, but that if the engine had started up he would have heard it. Finally, Mr. Sanders testified that he usually keeps N272TL locked in the hangar.

At the conclusion of the hearing, the law judge issued an oral initial decision, in which he provided a detailed summary of the evidence. The law judge stated that the case turned on credibility of the witnesses and concluded that Mr. Sanders's testimony was more credible than respondents' testimony. Initial Decision at 496. The law judge determined that Mr. Sanders did not have a motive to lie, and that it was possible, "but not at all likely" that respondents could have used N272TL without Mr. Sanders's knowledge; likewise, the law judge determined that it was also unlikely that respondents used Mr. Sanders's computer on March 28 , 2008, without Mr. Sanders's awareness. Id. at 486-88.

The law judge discussed at length his credibility finding with regard to Respondent Jeszka, and stated that it was incongruent that Respondent Jeszka did not inform Ms. Silvertooth on his first day back at the FSDO that he had reinstated his CFI when Ms. Silvertooth informed him that he would need to reinstate his medical and CFI certificates. The law judge also concluded that the evidence concerning the timing of the certificate applications was inconsistent with respondents' testimony, as both respondents initially testified that they had completed the application electronically before noon on March 28, 2008, but the IACRA data showed otherwise. Similarly, the law judge stated that it was nonsensical for Respondent Jeszka to have called Respondent Ledbetter and arranged to meet with him on the way to Jasper so that they could travel together and conduct the oral portion of the exam, if Respondent Jeszka had already begun the application at his home. The law judge also stated that he had considered the fact that no evidence indicated that Respondent Jeszka had offered to pay Mr. Sanders for the use of N272TL as indicative that the flight did not occur. The law judge similarly discussed the credibility of Respondent Ledbetter's testimony, and stated that the telephone records did not necessarily help respondents' case, because they did not establish why or even who was in Jasper on March 28, 2008. The law judge concluded that the Administrator proved that respondents had violated 14 C. F.R. § 61.59 (a) (2), and affirmed the order of revocation.

In addressing the fact that Mr. Sanders could not recall whether respondents were present at his FBO on March 28, 2008, the law judge cited Administrator v. Aviance International, Inc., NTSB Order No. EA-3808 (1993). The law judge stated that, in Aviance, the Board observed that the Administrator almost always must rely on circumstantial evidence to prove falsification. The law judge further stated that the Board in Aviance reversed the law judge's order because the law judge drew his conclusion of falsification from the inability of several air traffic controllers to recall any training flights at issue , and this lack of memory did not suffice to prove the Administrator's falsification case. Initial Decision at 482. The law judge distinguished Aviance by finding that, in the case at hand, the circumstantial evidence "is more than sufficient to prove" that the March 28, 2008 flight did not occur. Id. at 498. The law judge based this finding on the fact that Mr. Sanders's testimony indicated that he would have been aware of respondents using his aircraft on March 28, 2008, if the flight had occurred. The law judge then discussed the evidence supporting this conclusion. Id. at 498-99.

On appeal, respondents challenge the law judge's credibility findings concerning both respondents, as well as one of the l aw judge's evidentiary rulings prior to the hearing with regard to credibility, respondents assert that Mr. Sanders did not provide credible testimony, and that the telephone records they provided showed that they completed the flight check on March 28, 2008. Respondents also contend that the law judge misunderstood the Board's holding in Aviance when he found that the case was distinguishable. In particular, respondents contend that Aviance requires a law judge to decide: (1) whether the person who fails to recall an event was present at the event; and (2) whether the person's memory was dispositive. Respondents assert that the law judge erred in not finding that the Administrator failed both prongs of this test, as Mr. Sanders could not recall even being at his FBO on March 28, 2008. Respondents also contend that the law judge erred when he found Mr. Sanders's testimony more credible than respondents' testimony.

Respondents also argue that the law judge erred in quashing two subpoenas that respondents intended to issue. Respondents assert that they sought to call two FAA employees who had overseen Mr. Sanders, and that the employees would testify that Mr. Sanders had problems with recordkeeping and with his memory. Respondents assert that the law judge's reliance on 49 C.F.R. § 9.7(b)[4] for his decision to quash the subpoenas was misplaced. In particular, respondents argue that, during a telephonic hearing with the law judge, respondents' counsel requested approval to call the witnesses from the FAA. When the FAA did not agree to allow the witnesses to testify, the law judge quashed the subpoenas under § 9.7(b). Respondents argue that this ruling was erroneous because it "severely prejudiced" respondents' case, in that Mr. Sanders's memory significantly affected the outcome of the case. Appeal Br. at 15. The Administrator contests each of respondents' arguments, and urges us to affirm the law judge's decision.

We reject respondents' assertions that the law judge erred in finding Mr. Sanders's testimony more credible than respondents' testimony, and in distinguishing the Aviance case. First, we note that we have long deferred to the credibility findings of the Board's law judges in the absence of a showing that such findings are arbitrary, capricious, or contrary to the weight of the evidence. [5] In the case at issue, the law judge's credibility findings were solidly based on his observation of the witnesses while they were testifying, and were not contrary to the evidence. In fact, our review of the record in light of the law judge's decision leads us to the same conclusion with regard to credibility. The law judge correctly noted that Mr. Sanders did not have a motive to provide false information concerning respondents, whereas respondents obviously had an interest in the outcome of the proceeding during their testimony. In addition, we note that portions of respondents' testimony were inconsistent,[6] and that respondents testified that they could not recall certain aspects of the alleged flight that they conducted.[7] In addition, we have carefully reviewed the record and determined that certain components of respondents' testimony were simply not credible.[8] With regard to the Aviance case, we agree with the law judge's assessment. Aviance is distinguishable from the case at hand because, in Aviance, we cautioned law judges to refrain from affording too much weight to the fact that a witness does not recall a certain event as evidence that the event did not occur. Even in exercising such caution in reviewing the record in this case, we nevertheless find that Mr. Sanders's lack of recollection that Respondent

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[4] Title 49 C.F.R. § 9.7(b) provides as follows:

> An employee may testify for the United States both as to facts within the employee's personal knowledge and as an expert or opinion witness .... [A] n employee may not testify as an expert or opinion witness, with regard to any matter arising out of the employee's official duties or the functions of the Department, for any party other than the united States in any legal proceeding in which the United States is a party. An employee who receives a demand to testify on behalf of a party other than the United States may testify as to facts within the employee's personal knowledge, provided that the testimony be subject to the prior approval of agency counsel and to the Federal Rules of civil Procedure and any applicable claims of privilege.

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[5] Administrator v. Nicki, NTSB Order No. EA-5287 at 6 (2007) (citing Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983).

[6] At times, respondents appeared to assert that Mr. Sanders was present on March 28, 2008, when they flew N272TL. Tr. at 161. Respondent Ledbetter testified that he had a conversation with Mr. Sanders on March 28, 2008, while at the FBO, but could not recall the subject of the conversation. Tr. at 162. However, respondents' brief emphasizes that Mr. Sanders testified that he was likely "in and out" of the FBO throughout the day and was likely not present while respondents operated N272TL. Appeal Br. at 11-12.

[7] Respondent Ledbetter testified that he could not recall where N272TL was located when he and Respondent Jeszka arrived to conduct the check ride on March 28, 2008, nor could he recall whether they used Mr. Sanders's computer on March 28, 2008. Tr. at 165. Respondent Ledbetter also could not specifically recall when he asked Mr. Sanders about using N272TL for the check ride. Tr. at 162 (stating he asked "probably 4 or 5 days before"). Respondent Jeszka could not recall where he began to enter information for his application into the IACRA system,

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and, when confronted with the IACRA data, opined that he must have begun the application while at home the morning of March 28, 2008. Tr. at 390-91. Respondent Jeszka speculated that he must have been speaking with Respondent Ledbetter or Mr. Sanders while entering the data, since he had a difficult time filling it out. Tr. at 391. Respondent Jeszka could not recall whether Mr. Sanders was present on March 28, 2008, when he allegedly completed the application at the FBO. Tr. at 396-97.

[8] Respondents' testimony that Mr. Sanders's practice was to leave N272TL outside the hangar with the keys accessible (Tr. at 134, 207), except at night, is not credible, and defies Mr. Sanders's testimony that he kept N272TL locked inside his hangar (Tr. at 85). Furthermore, Respondent Jeszka testified, and the telephone records indicate, that he spoke with Mr Sanders in the morning on March 28, 2008, for 19 minutes. Tr. at 208-209; Exh. R-6. Respondent Jeszka stated that the purpose of this conversation was to ensure that N272TL would be available for his use; however, the evidence indicates that the conversation was lengthy, and Respondent Jeszka had already testified that Respondent Ledbetter had made all the arrangements for using N272TL. In addition, as the law judge noted, Respondent Jeszka's failure to inform Ms. Silvertooth that he had just reinstated his CFI after he read the memorandum indicating that he must reinstate his CFI and medical certificates is also incongruous.

Jeszka's flight check occurred on March 28, 2008, is not dispositive, as the law judge's rejection of respondents' testimony was largely based on credibility findings. Overall, we agree with the law judge's conclusion that the Administrator proved that respondents violated § 61.59(a) (2) by falsifying a record.[9]

Finally, we also find respondents' argument concerning the law judge's ruling on subpoenas for FAA employees to be unpersuasive. We have previously held that law judges have significant discretion in overseeing administrative hearings and admitting evidence into the record.[10] Moreover, we will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion.[11] In the case at hand, respondents have not shown that the law judge abused his discretion by applying 49 C. F.R. § 9.7(b) to exclude certain testimony. Respondents did not show that they had received prior approval of FAA counsel in accordance with § 9.7(b); therefore, the law judge did not err in finding that respondents did not fulfill the requirements of § 9.7(b). Even if the witnesses' testimony would have helped their case, as respondents surmise, respondents cannot show that the law judge abused his discretion in applying the criteria of § 9.7 (b) to the proposed subpoenas.

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[9] For such falsification cases, we have long adhered to a three-prong standard to prove a falsification claim: the Administrator must prove that a pilot (1) made a false representation, (2) in reference to a material fact, (3) with knowledge of the falsity of the fact. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976) (citing Pence v. United States, 316 U.S. 332, 338 (1942)). The law judge correctly concluded that the Administrator provided evidence to fulfill all three prongs in this case.

[10] Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)).

[11] See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order NO. EA- 5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondents' appeal is denied;
2. The law judge's decision is affirmed; and
3. The Administrator's emergency revocation of respondents' ATP, flight instructor, mechanic, and any other airman certificates they may hold is affirmed.

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, and SUMWALT, Members of the board, concurred in the above opinion and order.

SERVED: September 15, 2009
NTSB Order No. EA-5479

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of September, 2009

J. RANDOLPH BABBITT,
Administrator, Federal Aviation Administration,

Complainant,

Dockets SE-18571 and SE-18575

v.

RAYMOND A. LEDBETTER and
EDWARD T. JESZKA,

Respondents.

ORDER DENYING PETITON FOR REHEARING

Respondents seek rehearing concerning our decision in this proceeding, NTSB Order No. EA-5458, served June 17, 2009. In that decision, we affirmed the Administrator's order and the law judge's initial decision, finding that respondents violated 14 C.F.R. § 61.59{a) (2), by making or causing to be made a fraudulent or intentionally false entry on a temporary airman flight instructor certificate for Respondent Jeszka. In particular, the Administrator alleged that respondents indicated that Respondent Jeszka completed a flight check on March 28, 200B, under the supervision of Respondent Ledbetter, when no such flight occurred.

The law judge denied respondents' appeal of the revocation order, principally based on his determination that respondents' testimony was not credible; the law judge found that the testimony of Joseph Sanders, a friend of both respondents who owns and operates Sanders Aviation, Inc., a fixed-base operator (FBO) at Walker County Airport in Jasper, Alabama, was more credible. The law judge's oral initial decision contained a detailed summary of the facts, and found that the Administrator proved that respondents violated § 61.59(a) (2). Respondents appealed the law judge's decision, and we denied the appeal, on the basis that the law judge's credibility findings were legitimate, and that other evidence in the record corroborated the determination that respondents violated § 61.59(a) (2) when they did not complete the check ride, as they had stated. We affirmed the law judge's initial decision and the emergency order of revocation of respondents' airline transport pilot certificates, flight instructor certificates, mechanic certificates, and any other airman certificates they may hold.

Respondents filed a petition for rehearing. Title 49 C.F.R. § 821.57{d) provides that the Board will consider such petitions only when they are based on

the discovery of new matter. Section 821.57(d) further states that such petitions
must:

(1) set forth the new matter;
(2) contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and
(3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

Moreover, the new matter must be such that would materially affect the case; in Administrator v. Moore, 3 NTSB 55, 56 (1977), we stated that newly discovered evidence "must be more than impeaching in nature and must be such as would probably produce a different result." As such, new matter that a petitioner attempts to introduce in the context of § 821.57{d) must be matter that would likely affect the outcome of the case.

Respondents request a rehearing so that the Board may hear the testimony of Jack Gray, who also operates an FBD at Walker County Airport. Respondents attached a brief affidavit from Mr. Gray, which states that he would testify that, on March 28, 2008, he heard Respondent Ledbetter's voice on the radio frequency, indicating that Respondent Ledbetter was likely flying on March 28, 2008. Respondents state that they did not consider that Mr. Gray could provide such testimony until after the evidentiary record was closed because the case proceeded on an expedited timeline as an emergency case, and because 11 months elapsed between March 28, 2008, and the issuance of the emergency orders. Respondents further contend that Mr. Gray's testimony would be significant because he is the only witness other than Mr. Sanders who could testify concerning the events of March 28, 2008.

Respondents' petition does not provide an adequate reason for their failure to discover, until recently, that Mr. Gray was at the airport on March 28, 2008. Given the small size of Walker County Airport and the fact that only two FBOs operate at the airport, we do not find respondents' contention that they could not have discovered Mr. Gray's testimony persuasive. While we recognize that the deadlines in emergency cases may present challenges, we do not find that they excuse a party's failure to conduct complete discovery. Moreover, respondents have not established that the testimony would materially affect the case; we previously rejected respondents' challenges to the law judge's credibility findings, and Mr. Gray's testimony could not alter such findings and the corroborating evidence.

ACCORDINGLY, IT IS ORDERED THAT:

Respondents' petition for rehearing is denied.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, Member of the Board, concurred in the above order.

APPENDIX

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-15721
Non-argument Calendar

Agency Nos. EA-5479-NTSB order, EA-5458-NTSB

EDWARD T. JESZKA,
RAYMOND A. LEDBETTER,

Petitioners,

v

NTSB,

Respondent.

Petition for Review of a Decision of the Department of Transportation

(August 16, 2010)

Before: EDMONDSON, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

On April 17, 2009, the Federal Aviation Administration issued emergency orders finding that petitioners Edward Jeszka and Raymond Ledbetter had intentionally falsified required records, in violation of 14 C.F.R. § 61.59(a)(2). The FAA's orders revoked the airman certificates of both Ledbetter and Jeszka. See 14 C.F.R. § 61.59(a)(2). Ledbetter and Jeszka appealed, and the two cases were consolidated. The administrative law judge affirmed the Administration's orders, and his ruling was in turn affirmed by the National Transportation Safety Board. The Board later denied Ledbetter and Jeszka's petition for rehearing. They have petitioned this Court for review.

I.

During February and March 2008, Jeszka was employed as an FAA inspector in the Birmingham, Alabama Flight Standards District Office (FSDO). He had been on extended sick leave since October 2006 while undergoing treatment for cancer. In order to return to his full duties at the FAA, Jeszka needed to have his Certified Flight Instructor certificate reinstated, which required him to successfully complete an oral knowledge test and a practical flight test administered by a Designated Pilot Examiner.

On March 28, 2008, Jeszka initiated an FAA online Integrated Airman Certificate and Rating Application. Jeszka was applying to reinstate his

Certified Flight Inspector certificate. Later that day, Ledbetter, acting as Jeszka's Designated Pilot Examiner, signed Jeszka's application. Ledbetter and Jeszka are longtime friends.

According to the application signed by both men, on March 28, 2008, Ledbetter had administered to Jeszka, and Jeszka had successfully completed, both the oral and practical tests required to reinstate his CFI certificate. The application also stated that the practical test had been administered to Jeszka at the Walker County Airport in Jasper, Alabama, using civil aircraft N272TL. Ledbetter issued a temporary airman certificate to Jeszka on that same day, March 28. Civil aircraft N272TL is a Cessna 172 airplane owned by the family of Joey Sanders, who is a longtime friend of both Jeszka and Ledbetter. Sanders runs a business, Sanders Aviation, that is one of only two fixed base operations at the Walker County Airport. In that role, Sanders Aviation provides "services [at the airport] similar to those that a service station provides for those who operate automobiles." City of Pompano Beach v. F.A.A., 774 F.2d 1529, 1532 n.5 (11th Cir. 1985). The Walker County Airport is a small, non-commercial airport with a very low volume of flights. Sanders Aviation is located in a building attached to a hangar facing the lone runway at that airport. The building and hangar are not soundproof, and all flights taking off or landing at the Walker County Airport can be heard inside the building and hangar.

In April 2009, the FAA issued one emergency order revoking all of Ledbetter's airman certificates and another one revoking all of Jeszka's airman certificates. Those emergency orders were based on the FAA's finding that the two had violated 14 C.F.R. § 61.59(a)(2) by intentionally falsifying required records. Specifically, the FAA found that: Jeszka electronically submitted an Integrated Airman Certificate and Rating Application on March 28, 2008; based on that application, Ledbetter, acting as a Designated Pilot Examiner, issued a temporary airman certificate to Jeszka; and Ledbetter and Jeszka falsely stated on that temporary airman certificate that Jeszka had completed a practical test flight on March 28, 2008.

Jeszka and Ledbetter appealed the emergency orders and an evidentiary hearing was held before an ALJ. Sanders testified at the hearing that he stores his Cessna in the hangar attached to his fixed base operation, and the hangar is usually locked. In 2008, Sanders' Cessna flew only thirty-eight hours and was not required to keep records of its usage. Sanders treats the Cessna as "just a family plane," and he occasionally, but "[not very often," allows his friends to borrow it if they ask his permission first. When someone borrows his Cessna, Sanders arranges for the aircraft to be taken out of the hangar and readied for the borrower's use. If he is present at the airport, Sanders takes the plane out himself.

Sanders also testified that Ledbetter and Jeszka used his Cessna on February 11,2008, but he did not remember either of them using it after that date. He did not remember even seeing Jeszka at the Walker County Airport again until after June 2008, when Jeszka flew in a Beechcraft Barron airplane.

On cross-examination, when counsel for Ledbetter and Jeszka asked Sanders if he remembered being at the airport on March 28, 2008, he stated that nothing about that day stood out in his mind beyond the fact that he was "in and out all day." He added that if he was not running errands, he would have been at his operations at the airport. When asked if it was possible that Ledbetter had administered a check ride to Jeszka using Sanders' Cessna on March 28, Sanders replied that if such a flight did occur, it occurred without his knowledge. He explained that it would be difficult for someone to use his Cessna without his knowledge because he usually keeps it locked in the hangar, and if someone had started the airplane while he was there, he would have known it. When asked if he remembered Ledbetter and Jeszka being at the Walker County Airport on March 28, Sanders answered: "I don't remember them being there, and as far as I know, they were not there."

Ledbetter and Jeszka also testified at the hearing. Both denied that Jeszka was at the airport in Jasper, Alabama on February 11, and Ledbetter testified that Sanders incorrectly informed the FAA that Jeszka had been at the airport that day. Ledbetter testified that he had never flown Sanders' Cessna without getting Sanders' permission. Both Jeszka and Ledbetter testified that Ledbetter had called Sanders to get permission to use the Cessna for the practical test on March 28. Originally, Ledbetter and Jeszka testified that they met in Sumiton, Alabama, at around 2:30 p.m. on March 28, before riding together to the Walker County Airport. Both of them testified that Ledbetter administered the oral test to Jeszka during the drive to the airport. Ledbetter also testified that he had a conversation with Sanders after arriving at the airport, although he did not remember what they discussed.

Ledbetter and Jeszka also testified that, after arriving at the airport on March 28, they entered data into the Integrated Airman Certificate and Rating Application before conducting the practical test flight. Jeszka testified that Ledbetter entered the data into the application for him because he did not have an application account and was unfamiliar with the application system. Jeszka also testified that, following the flight, he and Ledbetter used a computer at Sanders' operation to complete the application and Jeszka's temporary airman certificate was printed after the application was completed.

The Integrated Airman Certificate and Rating Application system automatically stores a variety of information, including the time that a particular event occurs. A report detailing the stored information relating to Jeszka's application revealed that he began the application process at 8:23 a.m. on March 28, and that he completed his portion of the process and electronically signed the application at 12:13 p.m. Ledbetter completed the process by signing the application as the Designated Pilot Examiner at 5:52 p.m.

When confronted with that data from the application report, Jeszka changed his story. He said that he had started the application at his home at 8:23 a.m., rather than in the afternoon at Sanders' operation. He added that Ledbetter had come by his house that morning to help him finish the initial portion of the application. Jeszka did not deny signing the application at noon, as indicated in the report. He added that Ledbetter must have been present when he signed it, because that is part of Ledbetter's duties as the Designated Pilot Examiner. Jeszka still maintained that, after the practical test flight, he and Ledbetter completed the application using a computer in the upstairs office at Sanders' Aviation. The upstairs office is Sanders' private office, and he normally keeps it secured. Jeszka testified that he was unsure if Sanders was there when he and Ledbetter completed the application, but he thought so "because there was some kind of computer glitch."

At the conclusion of the evidentiary hearing, the ALJ issued an oral opinion and order upholding the FAA's emergency orders. The ALJ explained that he found Sanders to be a credible witness who "delivered his testimony in a straightforward manner" and who had no motive to lie about whether he had administered a practical test to Jeszka on March 28,2008. The ALJ also determined that Jeszka and Ledbetter were not credible witnesses. The ALJ relied on the fact that their initial version of the events of March 28 was contradicted by the information contained in the electronic application report, and both of the men had a motive to lie in order to avoid the revocation of their airman certificates. Relying on those findings, the ALJ affirmed the FAA's orders revoking the airman certificates of the two men.

Ledbetter and Jeszka appealed to the Board, which affirmed the ALJ's decision and the FAA's emergency orders revoking the airman certificates held by Ledbetter and Jeszka. The two then filed a petition for rehearing, which the Board denied. They have petitioned us for review of the Board's order affirming the decision of the ALJ and its order denying their petition for rehearing.

II.

We have jurisdiction to review final orders of the Board, 49 U.S.C. § 1153(a), (b)(3), but the scope of our review is narrow. "We uphold a decision of the NTSB unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or the challenged decision is contrary to constitutional right, power, privilege, or immunity." Coghlan v. NTSB, 470 F.3d 1300, 1304 (11th Cir. 2006) (quotation marks and citation omitted). "In other words, when reviewing an agency decision under the arbitrary and capricious standard, we must defer to the wisdom of the agency provided their decision is reasoned and rational." Swaters v. Osmus, 568 F.3d 1315, 1322 (11th Cir. 2009) (quoting McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir. 1982)).

"Findings of fact by the NTSB, if supported by substantial evidence, are conclusive." Coghlan, 470 F.3d at 1304 (quoting 49 U.S.C. § 1153(b)(3)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." McHenry v. Bond, 668 F.2d 1185, 1190 (11th Cir. 1982) (quotation marks omitted). In other words, substantial evidence requires "something more than a scintilla of evidence, but something less than the weight of the evidence; the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Id. (quotation marks omitted).

III.

Ledbetter and Jeszka challenge the Board's order affirming the ALJ's determination that they made an intentional false statement in violation of 14 C.F.R. § 61.59(a)(2). Section 61.59(a)(2) provides in pertinent part that "[n]o person shall make or cause to be made ... [a]ny ... intentionally false entry in any logbook, record, or report that is required to be kept, made, or used to show compliance with any requirement for the issuance or exercise of the privileges of any certificate, rating, or authorization ...." 14 C.F.R. § 61.59(a)(2). In order to establish intentional falsity under § 61.59(a)(2), the FAA must show that the pilot:

> (1) made a false representation, (2) in reference to a material fact, (3) with knowledge that the representation was false. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976); Sturgell v. Angstadt, NTSB Order No. EA-5421, 2008 WL 5373647, at 5 (Dec. 17,2008). A violation of § 61.59(a) may result in the suspension or revocation "of any airman certificate, rating or authorization held by" the person committing the violation. 14 C.F.R. § 61.59(b).

Ledbetter and Jeszka contend that the Board erred by concluding that the FAA had shown that they violated § 61.59(a)(2). Specifically, they argue that the FAA failed to show that they did not complete a practical test flight on March 28, 2008, as they indicated on Jeszka's temporary airman certificate. We are unpersuaded.

Sanders' testimony supports the Board's determination that the FAA showed that the March 28 flight did not occur. Sanders testified that he did not remember Jeszka or Ledbetter flying his Cessna after February 11, 2008, nor did he have any knowledge of the two men conducting a practical test flight in his Cessna on March 28, 2008, as they claimed. Not only that but he also testified that it would have been difficult for them to have used his Cessna without his knowledge because he usually keeps it locked in the hangar, and he would have heard and recognized the sound of its engine. The ALJ determined that Sanders was a credible witness because he had no motive to lie and because he "delivered his testimony in a straightforward manner." Sanders' testimony clearly supports the Board's determination that the FAA established the falsification charge.

In an attempt to minimize the impact of Sanders' testimony, Ledbetter and Jeszka emphasize Sanders' statement that he was "in and out all day" on March 28. Their point is that Sanders might not have been present when they conducted the practical test using his plane, so the flight could have occurred without Sanders' knowledge. That argument, however, conflicts with their own testimony. As the ALJ explained, both Ledbetter and Jeszka testified that they had obtained Sanders' permission to fly the Cessna on March 28, which means that if the flight occurred as they said, Sanders would have known about it. Ledbetter even testified that Sanders was present when the flight occurred. Finally, Jeszka testified that he entered the post-flight data into the online application using a computer in Sanders' private upstairs office and that he thought Sanders was present at that time. Sanders testified that he usually keeps that office secured.

In addition to Sanders' testimony, the ALJ's finding that Ledbetter and Jeszka were not credible witnesses is "a second, independent source of support for the Board's conclusion" that the FAA established a violation of § 61.59(a)(2). Swaters, 568 F.3d at 1323. The ALJ made an explicit finding that "Ledbetter and Jeszka [were] not credible witnesses as to their claim that Ledbetter administered a CFI practical examination on 3/28/2008 using Sanders' [Cessna] as stated on the on-line JACRA application that they both signed and filed." There is substantial evidence to support that credibility determination. See Id. at 1324. As we explained in Swaters, the ALJ's credibility determination "constitutes positive evidence against [petitioners] and in support of the FAA's case." Id. The Board's conclusion that the FAA established a violation of § 61.59(a) was not arbitrary and capricious.

Ledbetter and Jeszka also contend, however, that when the Board treated Sanders' testimony as dispositive proof of falsification, it improperly departed from its precedent without explanation. See McHenry, 668 F.2d at 1192 ("'An agency must either conform to its prior norms and decisions or explain the reason for its departure from such precedent. '" (quoting Miss. Valley Gas Co. v. FERC, 659 F.2d 488,506 (5th Cir. 1981)). Specifically, they accuse the Board of misapplying Balzo v. Aviance Internat'l, Inc., NTSB Order No. EA-5421, 1993 WL 47610 (Feb. 12, 1993). In Aviance, the Board held that the ALJ placed too much weight on the recollections of several air traffic controllers in concluding that certain training flights did not occur. 1993 WL 47610, at 2. The Board noted that there was no proof offered that any of the air traffic controllers were on duty when the flights at issue supposedly occurred. Id. Also, the Board explained that the air traffic controllers' memories could not be treated as "dispositive" because the pilots accused of falsifying records identified a training flight that did occur and of which the air traffic controllers were unaware. Id.

Jeszka and Ledbetter's argument that the Board improperly departed from Aviance without explanation lacks merit. They testified that Sanders gave them his permission to fly the Cessna on March 28 and that Sanders was present when the flight occurred. In light of that testimony, the ALJ rationally distinguished Aviance from this case, concluding that "Sanders more likely than not would have been aware of it" if Ledbetter and Jeszka had flown the Cessna on March 28. The Board, in addition to agreeing with the ALJ's analysis, further distinguished Aviance from this case. It noted that Sanders' testimony was not by itself dispositive because the ALJ's conclusion that Ledbetter and Jeszka did not conduct the test flight in Sanders' Cessna on March 28 as they claimed was "largely based on" the ALI's determination that petitioners' testimony to that effect was not credible. See Swaters, 568 F.3d at 1323, 1324. Because the Board distinguished its decision in Aviance from the present case in a way that is "reasoned and rational," we must defer to its decision. McHenry, 668 F.2d at 1190.

Petitioners also contend that the Board erred by concluding that the FAA had established the materiality of the facts represented. See Hart, 535 F.2d at 519 (requiring that the false representation be made in reference to a material fact). We cannot consider that argument because Jeszka and Ledbetter failed to raise it in their appeal to the Board and have offered no explanation for that failure. See 49 U.S.C. § 1153(b)(4) ("In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.").

IV.

Ledbetter and Jeszka also contend that the ALJ violated their due process rights by quashing subpoenas issued to two Aviation Safety Inspectors employed by the FAA. Both of those inspectors were formerly stationed at the Birmingham Flight Standards District Office, although they were not employed there during the investigation that gave rise to the proceedings against Ledbetter and Jeszka. According to Jeszka and Ledbetter, those two inspectors "were willing to testify" that Sanders had problems remembering when specific flights occurred and had difficulties with record keeping. Two days before the hearing, the ALJ quashed the subpoenas after learning that Ledbetter and Jeszka had failed to obtain the prior approval of the FAA's counsel as required by 49 C.F.R. §§ 9.5 and 9.7(b). According to them, the ALJ's order quashing the subpoenas prejudiced them by depriving them of the ability to present evidence in their favor.

Ledbetter and Jeszka fail to mention that the ALJ's order quashing the subpoenas explained that, "to minimize inconvenience and expense to both parties, the two inspectors will be allowed to testify by telephone during the hearing." See 49 CFR 821.35(b)(6) (granting ALJs the power "[t]o regulate the conduct of hearings"). The ALJ's decision to allow the two investigators to testify by telephone was the result of an agreement between the FAA's counsel and the attorney who represented Jeszka and Ledbetter at the hearing before the ALJ.

Ledbetter and Jeszka never attempted to have the inspectors testify by telephone during the hearing, as agreed. "The fundamental requirement of due process is the opportunity to be heard in a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (quotation marks omitted). Ledbetter and Jeszka were given the opportunity to present in a meaningful manner the testimony of the two inspectors, but they chose to pass up that opportunity. Because any prejudice they claim was self-inflicted, their due process argument fails.

V.

Finally, Jeszka and Ledbetter contend that the Board erred when it denied their petition for rehearing. Under the Board's rules of practice governing cases involving emergency orders, it will grant a petition for rehearing only if a new matter is presented that "could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed." 49 C.F.R. § 821.57(d);

see Administrator v. Moore, 3 N.T.S.B. 55, 56 (March 28, 1977).

The new matter that Ledbetter and Jeszka argue warrants a rehearing is the testimony of Jack Gray, the manager of the Walker County Airport. According to them, they attempted to contact everyone they believed was present at the airport on March 28, but they were unaware that Gray was present on that date and did not discover it until after the evidentiary record was closed. According to Ledbetter and Jeszka, the FAA's emergency procedures-specifically the short period between the issuance of emergency orders and the evidentiary hearing before the ALJ-caused their inability to discover Gray's testimony in time to present it at the hearing.

That argument is unconvincing. Walker County Airport is a small, noncommercial airport with only one runway and a low volume of flights. Gray is the manager of the airport. Given that he is a big fish in a small, still pond, we cannot say that the Board acted irrationally when it rejected the argument that Ledbetter and Jeszka could not have, in the exercise of due diligence, discovered Gray's testimony before the close of the evidentiary record. See Swaters, 568 F.3d at 1322. By February 2009, two months before the FAA even issued the emergency orders, Ledbetter and Jeszka had become aware that the FAA was investigating whether Ledbetter had administered a practical test to Jeszka on March 28,2008. Given the circumstances, the Board's decision to deny the petition for rehearing was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or ...

contrary to constitutional right, power, privilege, or immunity." Coghlan, 470 F.3d at 1304 (citation and quotation marks omitted). For the foregoing reasons, we AFFIRM the Board's decision and DENY Ledbetter and Jeszka's petition for review.

AFFIRMED, PETITION DENIED.